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Srinagar.
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1926

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Cases not fully Reportable

Reasons are given below each case

A. I. R. 1926 Journal 85 (1)

(*Calcutta*)

CHATTERJEA AND PAGE, JJ.

K. S. Bannerjee—Plaintiff—Appellant.

v.

Dharendra Krishna Deb and *others*—Defendants—Respondents.

Appeal No. 272 of 1920, Decided on 21st December 1925, from the Original Decree of the 1st Sub-J., Tipperah, at Comilla, D/- 27th July 1920.

(a) *Deed—Construction—Ijara lease—No right of transfer given under the lease—Lessee to surrender premises on expiry of lease—Lessee taking kabuliat in respect of some lands and for default in paying rent purchasing himself the lands in execution of decree for rent—Ijaradar cannot retain suit lands after expiry of lease.*

An ijara lease provided: "The lessee will not save and except for the purpose of granting dur-ijara settlements to dur-ijaradars or other tenants or persons by means of which the rents of the said demised premises or the greater portion thereof may be collected as heretofore, assign, under-let or otherwise part with the possession of the said hereby demised premises or any part thereof and will not enter into any partnership with any other person or persons in respect of the demised premises or any part thereof or charge or assign the lessee's interest under these presents or any part thereof without the previous written consent of the lessor. At the end (expiration) or other sooner determination of the said term the lessee peaceably and quietly surrender and yield up the said demised premises to the lessor.

Held: that the ijaradar could not under the terms of the lease retain possession of a jote purchased by him in decree for arrears of rent for the jote in respect of which he had given a kabuliat.

(b) *Landlord and tenant—Merger—Acquisition of superior and inferior right does not ipso jure cause merger—Intention has to be looked to—Transfer of Property Act, S.* 101.

Merger is not a thing which occurs ipso jure upon the acquisition of the superior with the inferior right. There may be many reasons—convincing reasons arising out of the object of the acquisition of the one right being merely for a temporary purpose, family reasons and others—in the course of which the expediency of avoiding the coalescence of interest and preserving the separation of title may be apparent. In short the question to be settled in the application of the doctrine is, was such a coalescence of right meant to be accomplished as to extinguish that separation of title which the records contain: *A. I. R.* 1922 *P. C.* 94, *Foll.*

(a) *On facts*: *Deed—Construction.*

(b) *Simply follows A. I. R.* 1922 *P. C.* 94.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal* pp. 33, 41, 45, 53, 61, 69, 73 & 81.

A. I. R. 1926 Journal 85 (2)

(*Lahore*)

LEROSSIGNOL AND FFORDE, JJ.

Ghulam Rasul and *another*—Plaintiffs—Appellants.

v.

Kamir and *others*—Defendants—Respondents.

First Appeal No. 2129 of 1921, Decided on 7th December 1925, from the decree of the Senior Sub-J., Jhang, D/- 30th April 1921.

Custom (Punjab)—Possession of some reversioners on behalf of widow is not adverse to other reversioners, during her life or until she re-marries.

Where some of the reversioners are in possession with the widow's consent, so long as the widow is alive and does not re-marry, their possession is not adverse to other reversioners who are of a nearer degree of relationship than themselves.

Point too simple.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 & 81.

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have a right to redeem, the legal effect of such provision is to make the second mortgage a usufructuary mortgage so as to entitle the mortgagee to claim the amount due on it at the time of the redemption : *A. I. R.* 1922 *All.* 174 (*F. B.*), ***Foll.***

Simply follows A. I. R. 1922 *All.* 174.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 & 81.

A. I. R. 1926 Journal 88 (1)

(*Patna*)

BROADWAY AND FFORDE, JJ.

Narain Dass—Defendant—Appellant.

v.

Sardul Singh—Plaintiff—Respondent.

Second Appeal No. 739 of 1922, Decided on 29th April 1926, from a decree of the Addl. J., Lahore, D/- 16th January 1922.

Limitation Act, Art. 134—*Alienee with knowledge of trust—Article applies.*

Art. 134 is not restricted in its application to the purchaser in the good faith, but applies equally to an alienee from a trustee for value, even when he takes the property with full knowledge, that the alienor is acting in excess of his power : 127 *P. R.* 1908 (*F. B.*), *Foll.*; 37 *All.* 660, *Not Foll.*

Follows 127 *P. R.* 1908 (*F. B.*).

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 & 81.

A. I. R. 1926 Journal 88 (2)

(*Lahore*)

ADAMI AND SEN, JJ.

(*Sheikh*) *Mabud Bakhsh* and *others*—Plaintiffs—Appellants.

v.

Mt. Mahmudan and *others* — Defendants—Respondents.

Second Appeal No. 762 of 1922, Decided on 27th July 1925, against the decision of the Addl. Sub-J.,, Bhagalpur, D/- 10th April 1922.

Benami—Onus of proving benami is on the propounder.

The onus of establishing benami is on the person alleging it. He has to lead evidence in proof of benami and the opposite party is entitled to give rebutting evidence.

On facts and a common point : see *A. I. R.* 1924 *P. C.* 84 ; 39 *C. L. J.* 98 *A. I. R.* 1925 *Oudh* 243 ; 15 *A. L. J.* 329 (*P. C.*)

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 & 81.

A. I. R. 1926 Journal 88 (3)

(*Lahore*)

CAMPBELL AND DALIP SINGH, JJ.

Ahmad Din—Plaintiff—Appellant.

v.

Mt. Rajo Bibi and *others*—Defendants—Respondents.

First Appeal No. 855 of 1922, Decided on 12th July 1926, from the decree of the 1st Cl. Sub-J., Amritsar, D/- 3rd December 1921.

Practice—New plea—New point raised for first time in arguments, should not be permitted.

A point regarding the application of the doctrine of Musha raised for the first time specifically in arguments should not be permitted to be raised at that late stage, especially when it required other evidence.

Common point : see *A. I. R.* 1925 *P. C.* 118 ; *A.I.R.* 1922 *All.* 346 ; 19 *A. L. J.* 97 (*P. C.*) ; *A.I.R.* 1923 *All.* 358 ; *A. I. R* 1925 *Lah.* 571 ; 20 *L. W.* 564.

See also Law Reporting Rules : *A. I R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69 73 & 81.

A. I. R. 1926 Journal 88 (4)

(*Allahabad*)

MEARS, C. J., AND KING, J.

Muhammad Inamullah Khan—Defendant—Appellant.

v.

Mt. Aisha Bibi and *others* — Plaintiff and Defendants—Respondents.

First Appeal No. 451 of 1922, Decided on 27th April 1926, from a decree of the Sub-J., Saharanpur.

T. P. Act, S. 82 — *'Contract to the contrary' refers to contract between mortgagor and mortgagee.*

The 'contract to the contrary' referred to in S. 82 means a contract between the mortgagor and the mortgagee ; hence a contract between mortgagor and his vendee to that effect is of no avail : 24 *Mad.* 85 ; *A. I. R.* 1926 *All.* 352 and 34 *All.* 63 (*P. C.*), *Foll.*; 9 *A. L. J.* 499, *Dist.*

Simply follows 34 *All.* 63 (*P. C.*) *and A. I. R.* 1926 *All.* 352.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 & 81.

A. I. R. 1926 Journal 89 (1)

(*Lahore*)

FFORDE AND CAMPBELL, JJ.

Ghulam Hussain Shah and *others*—Plaintiffs—Appellants.

v.

Said Jalal and *others* — Defendants—Respondents.

Second Appeal No. 905 of 1922, Decided on 2nd June 1926, from the decree of the Dist. J., Shahpur at Sargodha, D/- 4th January 1922.

Punjab Land Revenue Act, Ss. 158 *and* 126—*Mutation proceedings held before Second grade Assistant Collector as per private partition--S.* 158 *does not apply.*

Under S. 126 the only Revenue Officer who can hold proceedings for partition must be of a class not below that of an Assistant Collector of the 1st grade and therefore mutation proceedings before an Assistant Collector of the 2nd grade cannot be deemed to be partition proceedings within the meaning of S. 158.

Punjab Land Rev. Act (17 *of* 1887), *S.* 126 *is clear on this point.*

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 & 81.

A. I. R. 1926 Journal 89 (2)

(*Calcutta*)

CUMING AND B. B. GHOSE, JJ.

Srikanta Mandal and *others* — Plaintiffs—Appellants.

v.

Rani Jotirmoyi Devi and *others*—Defendants—Respondents.

Appeal No. 1125 of 1922, Decided on 24th November 1925, from a decree of the Dist. J., Murshidabad, D/- 14th December 1921.

Civil P. C., O. 22, *R.* 4—*Abatement.*

The case of the plaintiffs was that all the defendants jointly dispossessed them from the land in collusion with each other and they sued for mesne profits from them all.

Held : that if in appeal the legal representatives of the deceased respondents are not brought on the record, the appeal abates in its entirety.

Common point : see *A. I. R.* 1925 *All.* 141 ; 1924 *Cal.* 399 ; 1923 *Cal.* 294 (1) ; 1925 *Lah.* 494 ; 1923 *Lah.* 132 and 1925 *Pat.* 517.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 & 81.

A. I. R. 1926 Journal 89 (3)

(*Lahore*)

BROADWAY AND FFORDE, JJ.

Hasan Din and *others*—Defendants—Appellants.

v.

Jagat Singh and *others* — Plaintiffs—Respondents.

Second Appeal No. 1165 of 1922, Decided on 1st April 1926, from the decree of the Dist. J., Sialkot, D/- 31st March 1922.

Custom (*Punjab*)—*Alienation.*

The mere fact that a reversioner is cultivating the land alienated does not amount to acquiescence in the mortgage : 72 *P. R.* 1919, *Foll.*

Follows 72 *P. R.* 1919.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 & 81.

A. I. R. 1926 Journal 89 (4)

(*Lahore*)

HARRISON AND DALIP SINGH, JJ.

Muhammad Yasin and *others*—Plaintiffs—Appellants.

v.

Ghulam Muhammad and *another*—Defendants—Respondents.

Second Appeal No. 1721 of 1922, Decided on 9th June 1926, from a decree of the Dist., J., Karnal, D/- 30th March 1922.

Evidence Act, S. 115—*Widow adopting with consent of her husband's collaterals—Collaterals not objecting to the adopted son taking his share by partition—Adopted son taking care of the widow till her death and redeeming mortgage by her husband—Collaterals are estopped from challenging adoption.*

Where a widow adopted a son purporting to act under the authority of her deceased husband but with the concurrence of the existing collaterals of her husband and the collaterals did not object to the adopted son getting his share partitioned and the adopted son took care of the widow till her death and also redeemed a mortgage effected by the husband of the widow :

Held : that all these facts indicated that the collaterals acquiesced in the adoption and they were subseque tly estopped from challenging it : *A. I. R.* 1925 *Cal.* 1107, *Appl.*

On facts.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

Fishery—Jalkar—Part of river bed free from water during part of the year—Right to fishery over that part is not lost.

The grantee of a fishery right in a river is entitled to fish in all waters comprised within the bank of the river and the circumstances that a particular sheet of water may during part of the year be disconnected from the flowing stream or permanent current, does not affect the rights of the grantee : a jalkar so situated in the river-bed is essentially part of the river and the fish contained therein may properly be deemed fish of the river : 18 *C. L. J.* 399 and 42 *Cal.* 489 *P. C.*, *Foll.*

Simply follows 42 *Cal.* 489 (*P. C.*)

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 92 (1)

(*Lahore*)

EFFORDE AND CAMPBELL, JJ.

Sucha Singh and *another*—Plaintiffs—Appellants.

v.

Kaloo and *others* — Defendants—Respondents.

Second Appeal No. 2402 of 1922, Decided on 3rd June 1926, from a decree of the Dist. J., Ludhiana, D/- 12th June 1922.

Hindu Law—Joint family—Alienation—Necessity—Presumption.

Where the facts were : firstly, that the alienor was a man of excellent character ; secondly, that he had a son whose interests he was not likely deliberately to prejudice ; thirdly, that the alienation remained unchallenged for a long time, and fourthly, the other property of the alienor was under mortgage.

Held : that necessity for alienation may be inferred from these facts.

On facts.

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 92 (2)

(*Privy Council : From Patna*)

25th May 1925

LORD BLANESBURGH, SIR JOHN EDGE AND MR. AMEER ALI

Ganesh Narayan Sabi Deo—Appellant.

v.

Manik Lal Chander and *others*—Respondents.

Privy Council Appeal No. 129 of 1924.

Practice—Privy Council—Concurrent finding of fact will not be reopened.

It is not the practice of their Lordships of the Privy Council to reopen a concurrent finding of fact by the Courts below.

Common point : see *A. I. R.* 1925 *P. C.* 174 (1) ; 1925 *P. C.* 122 ; 1924 *P. C.* 232 ; 1924 *P. C.* 113 and 1922 *P. C.* 105 and 48 *I. A.* 114.

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 92 (3)

(*Lahore*)

CAMPBELL AND ZAFAR ALI, JJ.

Ramji Das—Defendant—Appellant.

v.

Fazl Azim and *others*—Plaintiff and Defendants—Respondents.

First Appeal No. 2827 of 1921, Decided on 30th January 1926, from a decree of the 1st Class Sub-J., Delhi, D/- 31st August 1921.

(*a*) *Equity—Person enjoying benefit of agreement cannot repudiate it.*

It is an equitable principle that a man cannot enjoy a substantial benefit under an agreement and then repudiate it.

(*b*) *Contract Act, S. 23 — Champerty and maintenance—Agreement to finance litigation is valid.*

Where an agreement that the person providing funds for litigation should be remunerated with a part of the proceeds is neither extortionate nor unfair as compared with the value of the subject-matter of litigation, the agreement can be upheld as valid : 1 *Lah.* 124, *Foll.*

(*a*) *Simple point.*

(*b*) *Follows I. L. R.* 1 *Lah.* 124.

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 92 (4)

(*Calcutta*)

CHAKRAVARTI, J.

Dhirendra Nath Roy and *others*—Plaintiffs—Appellants.

v.

Ahmed Mia and *others*—Defendants—Respondents.

Appeal No. 2083 of 1922, Decided on 13th March 1925, from the appellate decree of the Addl. Dist. J., Faridpur, D/- 9th May 1922.

Deed—Construction—Contract—Each contract must be construed with reference to its own terms.

Each contract must be construed according to its own terms and in the circumstances of that case. Cases may be helpful in so far as they lay down general principles but cannot be direct authority as to the construction to be put upon the deed before the Court in another case : 22 *C. W. N.* 904, *Distinguished.*

Common point : *A. I. R.* 1925 *C.* 656 ; *A.I.R.* 1924 *A.* 324 (*F. B.*) ; 8 *A.L.J.* 770 ; *A. I. R.* 1925 *M.* 1175 ; *A. I. R.* 1925 *O.* 11.

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 93 (1)
(*Calcutta*)

CUMING AND CHAKRAVARTI, JJ.

Prosonna Kumar De and *others*—Defendants—Appellants.

v.

Ananda Chandra Bhattacharjee and *others*—Plaintiffs—Respondents.

Appeal No. 2087 of 1922, Decided on 18th May 1925, from the appellate decree of the 2nd Sub-J., Tipperah, D/- 18th May 1922.

Landlord and tenant—Right of re-entry—Proof of abandonment is not necessary when entire holding is sold and possession is given to purchaser.

Where the tenant of a non-transferable holding sold the entire holding without making any provision for the rent being paid.

Held : it is not necessary for a landlord seeking to re-enter to prove as a fact that the holding has been abandoned, but it is a direct inference from the fact that the entire holding was sold and possession given to the purchaser : 17 *C. W. N.* 1105, *Foll.*

A very simple point based on facts.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 93 (2)
(*Lahore*)

SHADI LAL, C. J.

Hurmat Ali and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Reference No. 240 of 1924, Decided on 11th April 1924, made by the S. J., Hoshiarpur, on 7th January 1921.

Criminal P. C., S. 367—Judgment not discussing facts, nor the grounds of appeal, must be set aside under S. 439.

Where a Court does not discuss the facts nor the grounds of appeal its judgment is not in accordance with law and must be set aside in revision : *A. I. R.* 1921 *Lah.* 102, *Foll.*

Simply follows A. I. R. 1921 *Lah.* 102.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 93 (3)
(*Lahore*)

CAMPBELL, J.

Chet Ram—Plaintiff—Appellant.

v.

Mt. Ilaicho and *others*—Defendants—Respondents.

Second Appeal No. 2112 of 1923, Decided on 8th January 1925, from a decree of the Dist. J., Hoshiarpur, D/- 4th July 1923.

Civil P. C., O. 22, R. 4—Suit against several defendants as trespassers in joint possession—Abatement of second appeal against one of them on account of his death and his legal representatives not having brought on record operates against all.

Where the relief sought is joint and indivisible against all the defendants, the consequence of the abatement of the appeal against one of them, who died during the pendency of the second appeal and whose legal representatives were not brought on record within the prescribed period, is the complete abatement against all ; and where the defendants were alleged in the plaint as trespassers in possession of the land jointly, it cannot be asserted at such stage that the defendants were in possession in definite shares and the abatement operates as against the share of the deceased only : *A. I. R.* 1923 *Lah.* 132, *Foll.*

Follows A. I. R. 1923 *Lah.* 132.

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61 69, 73 and 81.

A. I. R. 1926 Journal 93 (4)
(*Calcutta*)

GREAVES AND PANTON, JJ.

Akshoy Kumar De Patwari—Judgment-debtor—Appellant.

v.

Nalini Kumar Majumdar and *another*—Decree-holder—Respondent.

Appeal No. 295 of 1924, Decided on 10th November 1925, from an order of the Dist. J., Noakhali, D/- 9th April 1924.

Limitation Act, S. 12—"*Time requisite.*"

No period can be regarded as requisite under the Act which need not have elapsed if the appellant had taken reasonable and proper steps to obtain a copy of the decree or order: *A. I. R.* 1922 *P. C.* 352, *Foll.*

Simply follows A. I. R. 1922 *P. C.* 352.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 96 (1)

(*Lahore*)

BROADWAY AND ZAFAR ALI, JJ.

Lal Shah—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 650 of 1924, Decided on 19th November 1924, from the order of the S. J., Gurdaspur, D/- 5th July 1924.

Criminal P. C. (amended 1923), *S.* 339—*Forfeiture of pardon before amendment of Code—Trial after amendment—Trial without certificate is bad.*

Where a pardon has been forfeited and the order directing the prosecution of the person who has forfeited the pardon has been made at a time when the old Code was in force, but the committal proceedings and the trial were held after the new Code had come into operation.

Held: that in the absence of a certificate the trial was vitiated: 5 *Lah.* 379, *Foll.*

Follows A. I. R. 1925 *Lah.* 15.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 96 (2)

(*Calcutta*)

B. B. GHOSE AND GRAHAM, JJ.

Bireswar Mookherji—Appellant.

v.

Sm. Troilokhya Dasi—Respondent.

Appeal No. 650 of 1924, Decided on 27th April 1926, from the appellate decree of the 1st Sub-J., Howrah, D/- 8th January 1924.

Landlord and tenant—Permanent tenancy—No lease creating tenancy—Rent unchanged for series of years although value of the land increased abnormally — Permanent tenancy is created.

Where there was no written lease creating the tenancy; the tenancy had come down to the defendant by a series of successions, the land was let out for dwelling purposes, and the rent had not been changed for a number of years; whereas the value of the land had increased abnormally:

Held: that the original grant was of a permanent character

Simply on facts.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73, and 81.

A. I. R. 1926 Journal 96 (3)

(*Lahore*)

HARRISON, J.

Thakar Singh and *another*—Plaintiffs—Appellants.

v.

Indar Singh and *others*—Defendants—Respondents.

Second Appeal No. 1059 of 1924, Decided on 18th December 1924, from a decree of the Dist, J., Lahore, D/- 5th January 1924.

Co-sharers—Sale of joint property—A co-sharer can claim declaration that he is entitled to a share in the property sold.

So long as partition has not taken place each co-sharer has a share in every fragment and portion of the joint holding, and if his rights are infringed by his co-sharer alienating or selling them, he is entitled to a decree at any time to the effect that he is a joint owner of any portion alienated, sold or charged. This is not the same thing as saying that he is entitled to physical possession of that portion without partition, but he is always entitled to his decree: 124 *P. R.* 1879, *Foll.*

Simply follows 124 *P. R.* 1879.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 96 (4)

(*Allahabad*)

MEARS, C. J., AND KING, J.

Balkaran Singh and *others*—Plaintiffs—Appellants.

v.

Mt. Dulari Bai and *others*—Defendants—Respondents.

Second Appeal No. 341 of 1924, Decided on 25th June 1926, from a decree of the Sub-J., Mirzapur, D/- 29th November 1923.

(*a*) *Practice—New pleas—Points which should have been alleged in pleadings, must not be entertained by appeal Courts.*

Appellate Courts ought not to entertain points which should have been alleged in the pleadings

and made the subject of an issue and of arguments and of decision by the trial Court and also stated in the grounds of appeal clearly and directly.

(b) *Evidence Act, S. 90 — Presumption of genuineness includes presumption of executant's authority.*

The presumption which is allowed by S. 90 that a document more than 30 years old duly executed by the party by whom it purported to be executed also includes the presumption that where signature of the executant purports to have been made by the pen of a scribe the scribe must be duly authorised to sign for the executant: *A. I. R.* 1925 *All.* 1 (*F. B.*), *Foll.*

(a) *Very common point.*

(b) *Simply follows A. I. R.* 1925 *All.* 1 (*F. B.*).

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 97 (1)

(*Lahore*)

ZAFAR ALI, J.

Pira and *another*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1072 of 1924, Decided on 3rd March 1925, from an order of the Mag., 1st Cl., Jhang, D/- 25th November 1924.

Criminal P. C., S. 35—Sentence—Three distinct offences — Separate sentence is justified though all offences are committed in the same transaction.

If three district offences are committed, the offenders are liable to punishment for each offence though all three are committed in the course of the same transaction.

See Criminal P. C. S. 35 and *Penal Code, S. 34.*

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 97 (2)

(*Allahabad*)

KING, J.

Nageshwar Tewari—Defendant 1—Appellant.

v.

Rup Narain Shukul and *another*—Plaintiff and Defendant 2—Respondents.

Second Appeal No. 657 of 1924, Decided on 6th July 1926, from a decree of the Addl. Sub-J., Basti, D/- 10th December 1923.

Civil P. C., S. 64—Alienation of property during attachment—Attachment ceasing under O. 21, R. 57—Property sold under second attachment—Alienation is not void as against purchaser under second attachment.

Where property attached in execution of a decree is alienated, but after such alienation is again attached, the first attachment having expired under O. 21, R. 57, and is brought to sale in pursuance of the second attachment, the alienation during first attachment is not void as against the auction-purchaser in the sale under the second attachment: 6 *All.* 33, *Foll.*

Simply follows 6 *All.* 33.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 97 (3)

(*Lahore*)

HARRISON, J.

Mohan Singh and *another*—Judgment-debtors—Appellants.

v.

Nathu Mal—Decree-holder—Respondent.

Mis. Second Appeal No. 1190 of 1924, Decided on 12th January 1925, from an order of the Dist. J., Amritsar, D/- 24th January 1924.

Limitation Act, S. 14—Extension of time cannot be granted for an application not lying in any Court.

An application which does not lie in any Court cannot be taken into account for the sake of extending time under S. 14: 22 *P. R.* 1912, *Foll.*

Simply follows 22 *P. R.* 1912.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 97 (4)

(*Madras*)

SPENCER, J.

D. K. Syed Ibrahim Sahi and *others*—Plaintiffs—Appellants.

v.

K. Krishnaswami Naicker and *another*—Defendants—Respondents.

Second Appeal No. 1115 of 1925, Decided on 10th March 1926, from the decree of the Dist. J., Ramnad, at Madura, D/- 13th November 1922, in A. S. No. 366 of 1921.

A. I. R. 1926 Journal 100 (1)

(*Lahore*)

MARTINEAU, J.

Ram Gopal and *others*—Defendants—Appellants.

v.

Bhan Ram-Mangal Chand and *another*—Plaintiffs—Respondents.

Second Appeal No. 1676 of 1924, Decided on 19th January 1926, from an order of the Dist. J., Hissar, D/- 22nd March 1924.

Hindu Law—Debt for money due for goods supplied for family business binds co-parceners.

Money due for a debt for goods supplied for the family business binds all the co-parceners : *A. I. R.* 1921 *Lah.* 61, *Foll.*

Follows A. I. R. 1921 *Lah.* 61.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 100 (2)

(*Patna*)

BUCKNILL AND FOSTER, JJ.

Firangi Rai and *others*—Defendants—Appellants.

v.

Chheddi Pandey and *others*—Plaintiffs—Respondents.

Appeal No. 886 of 1924, Decided on 9th August 1926, from the appellate decree of the Dist. J., Saran, D/- 20th March 1924.

(*a*) *Bengal Tenancy Act, Ss.* 25, 86 *and* 87—*Landlord can obtain possession of occupancy raiyats holding in three ways as in S.* 25, 86 (5) *and S.* 87.

There are three methods by which a landlord subject to the Bengal Tenancy Act, can obtain possession of an occupancy raiyat's holding : (a) on a decree as mentioned in S. 25 ; (b) on relinquishment or surrender in the manner described in S. 86 (5) and (c) on abandonment as in S. 87 of the same Act.

(*b*) *Bengal Tenancy Act. S.* 87—*Holding put to sale and purchased cannot be said to be abandoned.*

To constitute an abandonment there must be voluntary abandonment of residence by the tenant without notice to the landlord and without arranging for payment of the rent as it falls due and cessation of cultivation of the holding either by himself or by some other persons. The mere fact that the plaintiff's holding was put to sale and purchased and that the holding was non-transferable does not go far enough to constitute proof of abandonment. The sale of a part of the holding, thongh invalid in the presence of the landlord who has not given his consent, is not an abandonment.

The law is clear from the wording of Ss. 25, 86 (5) and 87.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 100 (3)

(*Lahore*)

CAMPBELL, J.

Mt. Aishan—Plaintiff—Appellant.

v.

Municipal Committee, Lahore—Defendant—Respondent.

Second Appeal No. 2017 of 1924, Decided on 23rd January 1925 from a decree of the Dist. J., Lahore, D/- 16th April 1924.

Registration Act, S. 17 (1) (*d*)—*Mere recital of annual rate of rent in a lease does not make it one reserving yearly rent.*

The mere recital of an annual rate of rent in a lease does not constitute it a lease reserving a yearly rent within the meaning of S. 17 (1) (d) : 70 *P. R.* 1895 and 37 *P. R.* 1900, *Foll.*

Follows 70 *P. R.* 1895 and 37 *P. R.* 1900.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 100 (4)

(*Oudh*)

ASHWORTH, J.

Naresh Misra and *another*—Defendants—Appellants.

v.

Bidya Tewari and *others*—Plaintiffs—Respondents.

Second Appeal No. 392 of 1924, Decided on 2nd March 1926, from a decree of the 1st Addl. Sub-J., Gonda, D/- 30th May 1924.

Practice—Pleadings—Suit for recovery of money charged on property—Absence of express relief against the property does not indicate that only personal relief is claimed.

Where a suit is brought for the recovery of money charged on a property, the mere circumstance that the plaintiff does not expressly ask for relief against the property, but asks that a decree may be passed against the defendants is not a sufficient indication that he intended to claim relief against the defendants personally. and not against the property : 7 *O. C.* 108, *Foll.*

Follows 7 *O. C.* 108.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 101 (1)

(*Lahore*)

BROADWAY, J.

Tirath Ram—Defendant—Appellant.

v.

Municipal Committee, Amritsar—Plaintiff—Respondent.

Second Appeal No. 2096 of 1924, Decided on 19th December 1924, from the decree of the Senior Sub-J., Amritsar, D/- 7th January 1924.

Limitation Act, S. 5—Copy of main connected judgment not filed—Time was extended.

Where certain connected judgment (which was the main judgment) was not filed along with the memorandum of appeal but so many other copies had been filed, the High Court exercised in favour of the appellant its discretion under S. 5.

On facts.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 101 (2)

(*Calcutta*)

CUMING AND B. B. GHOSE, JJ.

Satish Chandra Ray and *others*—Plaintiffs—Appellants.

v.

Joy Chandra Roy—Defendants—Respondents.

Appeal No. 709 of 1924, Decided on 8th December 1925, from a decree of the 1st Addl. J., Dacca, D/- 17th December 1923.

Civil P. C., O. 21, R. 63— Attachment objected to but execution dismissed—Execution again sought and property again attached—Claim again preferred but rejected—Suit within one year of second rejection is not barred.

Where an attachment was made but the execution case was itself dismissed and the property was again attached when plaintiff objected to it and his claim having been rejected, he sued within one year of this rejection.

Held: that his suit was not time barred: *A. I. R.* 1924 *Cal.* 744, *Foll.*

Simply follows A. I. R. 1924 *Cal.* 744.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 101 (3)

(*Calcutta*)

CUMING AND B. B. GHOSE, JJ.

Radhamatulla Mondal and *others*—Plaintiffs—Appellants.

v.

Lokeman Dafadar and *others*—Defendants—Respondents.

Appeal No. 362 of 1924, Decided on 11th January 1926, from an order of the Sub-J., Nadia, at Krishnagar, D/- 22nd September 1924.

Civil P. C., S. 21—All conditions under S. 21 must be fulfilled for setting aside decree.

To entitle the appellate or revisional Court to set aside a decree on the ground that the trial of the suit took place before a Court which had no territorial jurisdiction over the property in dispute all conditions set out in S. 21 must be fulfilled.

Section 21 is clear.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 101 (4)

(*Lahore*)

SHADI LAL, C. J., AND LEROSSIGNOL, J.

Muhammad Din—Plaintiff—Appellant.

v.

Allah Ditta—Defendant—Respondent.

Letters Patent Appeal No. 148 of 1925, Decided on 11th March 1926, from the decree of Martineau, J., D/- 26th March 1925, in Appeal No. 2583 of 1924.

Evidence Act, S. 65—Distinction between admissibility and manner of proof—Secondary evidence cannot be admitted when primary evidence is not admissible.

A distinction must be drawn between the admissibility of evidence and the manner of proof. Secondary evidence may be offered of primary evidence only when the primary evidence itself is admissible. Until evidence is admissible it has in law no probative value and the question whether any given fact is to be proved by primary or secondary evidence is one concerning merely the method of proof. When the law has declared certain evidence to be inadmissible it cannot possibly be held that, though it may not be proved by primary proof, it may nevertheless be proved by secondary evidence. *A. I. R.* 1922 *Lah.* 401 (2), *Foll.* and an unsuccessful objection was made,

Follows A. I. R. 1922 *Lah.* 401 (2).

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 102 (1)

(Lahore)

ABDUL RAOOF, J.

Pal Singh—Plaintiff—Appellant.

v.

Ganga Singh and *another*—Defendants—Respondents.

Second Appeal No. 2268 of 1924, Decided on 21st March 1925, from a decree of the Dist. J., Amritsar, D/- 13th August 1924.

Civil P. C., S. 100—Particular transaction is mortgage or sale is a question of fact.

The question whether a certain transaction is a mortgage or sale is a question of fact and cannot be considered in second appeal: 104 *P.L.R.* 1908; 120 *P. L. R.* 1916; and *A. I. R.* 1924 *Lah.* 260, *Foll.*

Follows A. I. R. 1924 *Lah.* 260.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 102 (2)

(Madras)

WALLACE AND MADHAVAN NAIR, JJ.

V. Venkatarama Iyer—Appellant.

v.

T. V. Sundaram Iyer and *others*—Respondents.

Appeal No. 432 of 1924, Decided on 22nd October 1925, from the order of the Second Addl. Sub-J., Tinnevelly, D/- 30th October 1924.

(a) *Civil P. C., O. 41, R. 23—No appeal lies from remand order where trial Court disposes of all issues.*

An order of remand in a case where the trial Court has disposed itself of all the issues and given a decree on those findings cannot come within the scope of O. 41, R. 23, and therefore no appeal lies.

(b) *Civil P. C., O. 41, R. 23—Appellate Court cannot remand whole case when it wishes that further evidence on some issues should be recorded.*

The appellate Court cannot remand the whole case for retrial merely because it wishes further evidence on some issues, particularly when the trial Court has considered those issues on the evidence which was put in before it and recorded its findings thereon: *A. I. R.* 1925 *Mad.* 229, *Appr.*

(a) *Point simple; Repeats section;*
(b) *Simply follows A. I. R.* 1925 *Mad.* 229.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 102 (3)

(Lahore)

SHADI LAL, C. J., AND LE ROSSIGNOL, J.

Abdul Khaliq—Defendant—Appellant.

v.

Fateh Mohammad and *another*—Plaintiff and Defendant—Respondents.

Letters Patent Appeal No. 45 of 1925, Decided on 23rd November 1925, from the judgment of Campbell, J., D/- 6th January 1925, in Civil Appeal No. 929 of 1924.

Transfer of Property Act, S. 123—Even in case of minor donee, donor (father) must do all in his power to give formal seisin.

When the donee is a minor and the donor is his father, the donor on the completion of the gift must be held to hold on behalf of the donee, but before this presumption can be raised, the donor must do all in his power to give formal seisin to the donee. If there is a document he should register it; if there is no document and the land is revenue-paying land, he should get mutation effected.

Common point. See 24 *O. C.* 374: *A. I. R.* 1923 *Patna* 481; 29 *M. L. J.* 733; 35 *M. L. J.* 541: *also* 23 *M. L. J.* 734 and *cases referred to therein.*

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 102 (4)

(Oudh)

RAZA, J.

Ahmadullah and *others*—Defendants—Appellants.

v.

Bashir Ahmad and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 52 of 1925. Decided on 11th January 1926, against a decree of the Dist. J., Fyzabad, D/- 3rd November 1924.

(a) *Limitation Act, Art. 144—Plaintiff proving title—Defendant must prove adverse possession for 12 years.*

Under Art. 144, where plaintiff has established his title, the onus is on the defendants both to

plead and to prove adverse possession for the statutory period : *A. I. R.* 1924 *Oudh* 266 and 39 *Mad.* 617 *P. C. Foll.*

(*b*) *Co-sharers—Adverse possession — Open assertion of hostile title is necessary.*

The possession of one co-owner must be deemed to be the possession of all the co-owners unless there was some act of ouster by which one of the co-owners was deprived of possession by another. The mere fact that one co-owner was not in enjoyment of the rents and profits of the property in suit does not establish that other co-sharers were in possession adverse to the first. Where parties are co-shares and no partition has taken place between them, mere non-participation of profits by one and occupation and enjoyment of the joint property by the others is not per se adverse possession. There must be a disclaimer of others' right by an open assertion of a hostitle title on the part of the other co-owner setting up adverse possession and notice of such disclaimer to the others.

(*a*) *Follows* 27 *O. C.* 77=1924 *Oudh* 266 and 39 *Mad.* 617 (*P. C.*).

(*b*) *Common point. See A. I. R.* 1925 *Oudh* 266, 494, 510 *and* 241.

See also Law Reporting Rules : *A I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 103 (1)

(*Oudh*)

HASAN AND RAZA, JJ.

Baldeo Singh and *others*—Plaintiffs—Appellants.

v.

Mt. Gulab and *others*—Defendants—Respondents.

First Appeal No. 57 of 1924, Decided on 4th December 1925, from a decree of the Sub-J., Sitapur, D/- 3rd July 1924.

(*a*) *Hindu Law—Will—Party pleading undue influence must prove that—Evidence Act, S.* 101.

Where a person is impugning a Will on the ground that it was obtained by the exercise of undue influence, excessive persuasion or moral coercion, it lies upon him to establish that : *A. I. R.* 1924 *P. C.* 28, *Foll.*

(*b*) *Will—Construction—Donor acting foolishly but with full knowledge of his act—Will should be upheld.*

A man may act foolishly and even heartlessly in making a Will, but if he acts with full comprehension of what he is doing, the Court will not interfere with the exercise of his volition : *A. I. R.* 1924 *P. C.* 28, *Foll.*

It is essential to take care that the decision of the Court rests not upon suspicion, but upon legal testimony.

(*c*) *Will—Construction—Pardanashin lady.*

A Will executed by a pardanashin lady in lieu of services rendered by devisee was in plain language and otherwise natural and consistent with the probabilites of the case.

Held ; that the Will must be upheld.

(*a*) & (*b*) : *Follows A. I. R.* 1924 *P. C.* 28.

(*c*) *On facts.*

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 103 (2)

(*Lahore*)

MARTINEAU AND COLDSTREAM, JJ.

Pohla—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appoal No. 265 of 1925, Decided on 29th May 1925, from an order of the S. J., Ferozepur, D/- 29th January 1925.

Penal Code, S. 300—*Motive alone is not sufficient for conviction for murder where evidence of alleged eye-witnesses is unreliable.*

In this country and among Jats, murders are actually committed from motives of pride to avenge what appear to be comparatively harmless insults ; but where the evidence of the alleged eye-witnesses cannot be relied on, the presence of motive only will not be sufficient for a conviction under S. 300.

Simple point.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 103 (3)

(*Oudh*)

RAZA, J.

Shunkar—Plaintiff—Appellant.

v.

Mt. Mahadei—Defendant—Opposite Party.

Civil Application No. 159 of 1925, Decided on 25th November 1925, against the decree of the Munsif, Qaiserganj, as Small Cause Court Judge, D/- 30th May 1925.

Landlord and tenant—Mortgage of tenancy land is not void ab initio.

A mortgage of tenancy land by a tenant is not void ab initio : *A. I. R.* 1922 *Oudh* 287, *Foll.*

Simply follows A. I. R. 1922 *Oudh* 287.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81,

A. I. R. 1926 Journal 104 (1)

(*Lahore*)

ABDUL RAOOF AND ADDISON, JJ.

Mohar Singh—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 405 of 1925, Decided on 10th June 1925, from the order of the S. J., Hissar, D/- 27th February 1925.

Evidence Act, S. 24—Retracting confession of will not necessarily indicate invalidity or illegality but probative force depends on circumstances.

The mere fact that a confession is retracted will not raise an inference that it was obtained by improper inducement, threat or promise. Such a conclusion can only be arrived at from the evidence on the record or from the surrounding circumstances and not upon surmise or conjecture ; *A. I. R.* 1925 *Lah.* 605, *Foll.*

The fact that a confession has been retracted is immaterial as regards the legality of the admission of the confession as evidence against the person who made it. But the weight to be attached to a retracted confession depends upon the circumstances of each particular case : *A. I. R.* 1925 *Lah.* 605, *Foll.*

As regards the person making it a retracted confession may without corroboration form the basis of a conviction and though corroboration may be necessary as regards co-accused, it is not necessary that this corroborative evidence should by itself be sufficient to support a conviction : 30 *P. R. Cr.* 1914 and 29 *All.* 434, *Foll.*

Follows A. I. R. 1925 *Lah* 605 and 30 *P. R. Cr.* 1914.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 104 (2)

(*Madras*)

WALLER AND MADHAVAN NAIR, JJ.

Bermu Shetty—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 413 of 1925, Decided on 26th November 1925, from the order of the S. J., South Kanara, in Case No. 16 of 1925.

Penal Code, Ss. 302, 304 and 100—Deadly assault on accused's wife—Accused giving a fatal blow and causing death of assailant and also wounding and causing death of another person attacking him—No offence is committed under Ss. 302 and 304 as right of private defence arises

A dispute occurred about the headship of a family under whom the deceased and his sister were joi t tenants, and in consequence there was a quarrel between them over taking charge o paddy stored in a store room. During the quarrel the sister cried out that she was being killed. The accused, her husband, ran to the place and saw that his wife was being wounded and gave a blow with an aruval to the deceased. Another person who attacked accused was also wounded and he died.

Held : that the accused acted in private defence and was not guilty under Ss. 302 and 304.

On facts.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 104 (3)

(*Lahore*)

DALIP SINGH, J.

Atma Ram—Defendant—Petitioner.

v.

Ali Bakhsh—Plaintiff—Respondent.

Civil Revision Petition No. 448 of 1925, Decided on 28th January 1926, from a decree of the Small Cause Court Judge, Jullundur, D/- 20th April 1925.

Civil P. C., O. 20, R. 4—Judgment not in terms of R. 4 can be set aside in revision.

Where the terms of O. 20, R. 4, have not been complied with in a judgment of a Small Cause Court the judgment is defective and liable to be set aside in revision.

Common point. See A. I. R. 1925 *Oudh* 283 ; 7 *N. L. R.* 146 ; *A. I. R.* 1925 *Mad.* 1229 and *A. I. R.* 1922 *Lah.* 122 (1).

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 104 (4)

(*Allahabad*)

KANHAIYA LAL AND BOYS, JJ.

Mohammad Yusuf — Judgment-Debtor—Appellant.

v.

Mt. Amtul Habib—Decree-holder — Respondent.

Execution Second Appeal No. 447 of 1925, Decided on 3rd February 1926, from a decree of the Addl. Dist. J., Saharanpur, D/- 11th February 1925.

Civil P. C., S. 11—Question decided in execution proceeding—Same question cannot be re-opened in subsequent proceeding.

Where a Court executing decrees decided a question raised in the course of execution proceeding relating to the true construction to be

placed on a decree or order, that decision becomes final between the parties as an interlocutory order in the suit and the matter cannot be re-opened in a subsequent execution proceeding : 6 *All.* 269 *P. C., Foll.*

Simply follows 6 *All.* 269 (*P. C.*).

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 105 (1)

(*Lahore*)

CAMPBELL, J.

Diwan Singh-Tirlok Singh—Plaintiffs—Petitioners.

v.

Saudagar Singh—Defendant—Respondent.

Civil Revision No. 546 of 1925, Decided on 27th April 1926, from a decree of the Sub-J., Hafizabad, D/- 4th June 1925.

Limitation Act (amended by Punjab Act of 1904), Art. 52—Advance of grain.

A suit to recover advance of grain is governed by Art. 52 and the period, as amended by Punjab Act of 1904, is six years : 2 *L. L. J.* 191 and *A. I. R.* 1922 *Lah.* 271, *Foll.*

Follows *A. I. R.* 1922 *Lah.* 271.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journa 105 (2)

(*Calcutta*)

C. C. GHOSE AND DUVAL, JJ.

Arajali and *others*—Accused — Appellants.

v.

King-Emperor—Opposite Party.

Criminal Appeal No. 548 of 1925, Decided on 13th January 1926, from an order of the 2nd Addl. S. J., Backerganj, D/- 16th June 1925.

(*a*) *Criminal Trial—Circumstantial evidence must show that in all human probability accused must have committed the offence.*

Circumstantial evidence, in order to bring a charge home to an accused person, must be such as to show that within all human probability the act alleged must have been done by the accused person.

(*b*) *Penal Code, S.* 302 — *On conviction of murder only two penalties are possible—On verdict being challenged reference to High Court is the remedy.*

If a Judge accepts a finding of murder there are only two penalties. He has no right to pass inadequate sentence. If he does not believe the verdict to be right it is his duty to refer the case to the High Court.

Common points : *For* (*a*) see *A. I. R.* 1924 *L.* 62 ; *A.I.R.* 1923 *L.* 488 ; 21 *C.W.N.* 1152 ; 18 *C. W. N.* 1144 ; 41 *Cal.* 621 ; 1 *Pat. L. T.* 684 ; 27 *P. R.* 1913 *Cr.* ; (1914) *M. W. N.* 718 ; *A. I. R.* 1926 *Nag.* 118.

for (*b*) *S.* 302 *leaves no alternative* : see also 9 *I. C.* 885 ; 9 *M. L. T.* 510.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 105 (3)

(*Lahore*)

ABDUL RAOOF, J.

Abdul Qadir—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 590 of 1925, Decided on 5th June 1925, from an order of the Mag., Ferozepore.

Practice (Criminal)—When point at issue is of civil nature, parties should not be encouraged to resort to criminal Court.

Parties should not be encouraged to resort to the criminal Courts in cases in which the point at issue between them is one which can more appropriately be decided by a civil Court, but in each case it is to be seen whether the issue as to title is raised bona fide or mala fide : 33 *P. R.* 1910, *Foll.*

Follows 33 *P. R.* 1910 *Cr.*

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 105 (4)

(*Oudh*)

STUART, C. J. AND MISRA, J.

Kidar Nath—Plaintiff—Appellant.

v.

Bhikham Singh and *others* — Defendants—Respondents.

Second Appeal No. 268 of 1925, Decided on 7th December 1925, against the judgment and decree of the Dist. J., Hardoi, D/- 11th February 1925.

(*a*) *Hindu Law—Debts by manager--Necessity for loan and also for high rate must be established.*

It is incumbent on those who support the mortgage made by the manager of a joint Hindu

family to show not only that there was necessity to borrow but it was not unreasonable to borrow at a high rate and upon particular terms and if it was not shown that there was any necessity to borrow at the rate and upon the particular terms as were contained in the mortgage-deed that rate and those terms cannot stand : 41 *All.* 571 (*P.C.*), *Rel. on.*

(*b*) *Civil P. C., S.* 34 — *Discretion of lower Courts will not be interfered with by High Court unless exercised unreasonably.*

Unless it can be shown that the discretion exercised by the Courts below in allowing interest was exercised in an unreasonable manner no case is made out for interference by the High Court : 21 *O. C.* 265, *Ref. to.*

(*a*) *Follows* : *I. L. R.* 41 *A.* 571 (*P. C.*).
(*b*) *Follows* 21 *O. C.* 265.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 106 (1)

(*Oudh*)

RAZA, J.

Sriram—Defendant—Appellant.

v.

Jagat Narain—Plaintiff—Respondent.

Second Appeal No. 155 of 1925, Decided on 6th January 1926, from the decree of the Sub-J., Lucknow, D/- 27th February 1925.

(*a*) *Court Fees Act, S.* 7, *Cl.* xi (*cc*)—*Ejectment suit against tenant — Fees are payable on one year's rent — Valuation for jurisdiction and Court-fees is the same.*

The Court-fee payable on a suit for ejectment from a house against a tenant is chargeable on one year's rent under S. 7, Cl. (xi) sub-S. (cc) of the Court Fees Act and not on the market-value of the house. In such suits the valuation for purposes of jurisdiction and Court-fees is the same : 27 *P. R.* 1910 and 39 *Mad.* 873, *Foll.*

(*b*) *Civil P. C., S.* 99—*Decision given without hearing arguments—Merits of case not affected—Decree cannot be reversed.*

Even though a Court decides a case without hearing arguments its decree cannot be reversed when the irregularity does not affect the merits of the case or the jurisdiction of the Court.

(*a*) *Covered by Court Fees Act, S.* 7 (xi) (*cc*).

(*b*) *Covered by Civil P. C. S.* 99.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 106 (2)

(*Lahore*)

HARRISON, J.

Dhani—Defendant—Appellant.

v.

Biru and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 632 of 1925, Decided on 24th June 1925, from the decree of the Dist. J., Ludhiana, D/- 8th December 1924.

Custom (Punjab) — Gift to stranger — Reversioners are not justified in challenging the actions of donee.

Where the donee it not a collateral himself but a perfect stranger, the reversioners of the donor are not justified in questioning his action ; 47 *P. R.* 1919 and 40 *All.* 487 (*P. C.*), *Foll.*

Follows 47 *P. R.* 1919 *and* 40 *All.* 487.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69. 73 and 81.

A. I. R. 1926 Journal 106 (3)

(*Lahore*)

MARTINEAU AND ZAFAR ALI, JJ.

Dhanpat Rai and *others*—Appellants—Petitioners.

v.

Kahan Singh and *others* — Respondents.

Civil Misc. Application No. 591 of 1924, Decided on 2nd April 1925, for leave to appeal to His Majesty the King in Council from the decree in Civil Appeal No. 199 of 1920.

(*a*) *Civil P. C., S.* 110 — *Different findings but decree confirmed do not vary decree.*

When the High Court maintains the decree of the lower Court, it affirms the decision of the lower Court even though the two Courts differ in their findings on certain issues ; 25 *All.* 109 (*P. C.*), *Foll.*

(*b*) *Civil P. C., S.* 100—*Substantial question.*

A substantial question of law means a question of law in respect of which there may be a difference of opinion ; *A. I. R.* 1924 *Lah.* 473, *Foll.*

(*a*) *Follows I. L. R.* 25 *All.* 109 (*P. C.*).
(*b*) *Follows A. I. R.* 1924 *Lah.* 473.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 107 (1)

(Oudh)

WAZIR HASAN AND RAZA, JJ.

Chinta Ram and *others*—Defendants—Appellants.

v.

Ram Samujh and *others*—Plaintiffs—Respondents.

Second Appeal No. 206 of 1925, Decided on 24th August 1926, from the decree of the Addl. Dist. J., Gonda, D/- 9th January 1925.

Hindu Law—Settlement — Settlement between widow and her deceased husband's separated brother claiming under will, her husband's estate—Widow getting a portion of estate for life with no power of alienation — Brother taking remainder absolutely—Portion got by brother can be sold in execution of a decree against him.

A widow of a separate Hindu entered into a settlement with her deceased husband's brother, in a suit brought by him for possession of his brother's estate on the basis of a will in his favour, whereby the widow was given a certain portion of the estate for her life with no power of alienation and the brother got the remainder absolutely generation after generation.

Held : that there was nothing in law to prevent such a settlement from coming into operation. The reversionary estate in the brother which had the character of a mere spes successionis was converted into an absolute estate in remainder, which could be sold in a decree against him : *A. I. R.* 1922 *P. C.* 356 ; *A. I. R.* 1925 *P. C.* 272 and *A. I. R.* 1922 *Oudh* 236, *Foll.*

Follows *A. I. R.* 1922 *P. C.* 356 ; *A. I. R.* 1925 *P. C.* 272 and *A. I. R.* 1922 *Oudh* 236.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 107 (2)

(Lahore)

ABDUL RAOOF, J.

Bhola—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 634 of 1925, Decided on 20th July 1925, from an order of the S. J., Karnal, D/- 26th July 1925.

Penal Code, S. 304-II — Accused striking a woman with moosal—Woman not seen afterwards — Offence falls under S. 323 and not under S. 304 II.

Aecused hit his brother's wife with a moosal and dragged her inside the house. Since then the woman was not to be seen.

Held : as there was no definite evidence about the nature of the wound inflicted and as it was not proved that she had died of the wound accused cannot be held guilty under S. 304 II. Offence committed fell under S. 323.

On facts.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 107 (3)

(Allahabad)

DANIELS, J.

Emperor

v.

Daulat Singh and *another*—Accused—Opposite Parties.

Criminal Reference No. 621 of 1925, Decided on 17th November 1925, made by the Dist. Mag., Bareilly, on 10th October 1925.

Criminal P. C., S. 435 — District Magistrate cannot question the propriety of order by Court of Session.

Under S. 435 the District Magistrate can refer the proceedings of any inferior Court but he ir not entitled to question the propriety of an ordes passed by a Court of Session. His proper course when he considers that action is necessary, is to move the Government to file an application in revision : 28 *All.* 91, *Foll.*

Simply follows 28 *All.* 91.

See also Law Reporting Rules : *A. I, R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69. 73 and 81.

A I. R. 1926 Journal 107 (4)

(Lahore)

ZAFAR ALI, J.

Teja Singh—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 643 of 1925, Decided on 3rd October 1925, from an order of the S. J., Lyallpur, D/- 9th April 1925.

Evidence Act, Ss. 30 114, 133—Co-accused induced to make confession—Confession cannot be relied on.

It is unsafe to rely on the confession of a co-accused who has been induced to make a confession.

Covered by the sections.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 108 (1)

(*Bombay*)

MARTEN, C. J., AND PERCIVAL, J.

Shravan Shahasing Patil and *others*—Defendants—Appellants.

v.

Fattu Valad Saydu Musalman and *others*—Plaintiffs—Respondents.

Second Appeal No. 632 of 1925, Decided on 15th June 1926, from the decree of the Asst. J., Dhulia, in Appeal No. 39 of 1922.

Limitation Act, Art. 144—*Tenant holding possession after expiry of term—Tenant's possession becomes adverse from the date on which term expires and limitation begins from that date.*

After the term of the tenancy has expired the possession of the tenant becomes adverse in the absence of proof of any fresh tenancy and time begins to run in favour of the tenant from the date on which the term expired : 22 *Bom.* 893 and 24 *Bom.* 504, *Foll.*

Simply follows 22 *Bom.* 893 *and* 24 *Bom.* 504.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 108 (2)

(*Lahore*)

ADDISON, J.

Mt. Ghogri—Plaintiff—Petitioner.

v.

Mt. Manbhari — Defendant — Respondent.

Civil Revision No. 645 of 1925, Decided on 16th February 1926, from an order of the Dist. J., Delhi, D/- 20th August 1925.

Punjab Courts Act (6 *of* 1918), *S.* 41—*Application for certificate beyond time—Sufficient cause for extension of time is to be decided by District Judge.*

On an application for a certificate under S. 41, for second appeal made beyond the period of 30 days, before dismissing the application as time-barred, it is a question for the District Judge to decide whether there was sufficient cause for not presenting it within time.

Covered by the section.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 108 (3)

(*Allahabad*)

LINDSAY, J.

Banwari—Accused.

v.

Emperor—Opposite Party.

Criminal Reference No. 651 of 1925, Decided on 3rd November 1925, made by the S. J., Ghazipur, D/- 9th October 1925.

Penal Code, S. 173—*Mere refusal to accept summons is not offence.*

Mere refusal to take a summons does not amount to disobedience under S. 173 and so is not an offence.

Simply follows 21 *O. C.* 150; 40 *All.* 577.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 108 (4)

(*Lahore*)

JAI LAL, J.

Firm Ishar Singh-Dharam Singh—Plaintiff—Petitioner.

v.

Firm Ram Das-Karam Chand—Defendants—Respondents.

Civil Revision No. 674 of 1925, Decided on 11th May 1926, from an order of the Dist. J., Rawalpindi, D/- 29th April 1926.

Civil P. C., O. 9, *Rr.* 9 *and* 8—*Plaintiff not informed about adjournment—Dismissal must be set aside.*

Where plaintiff or his counsel is not informed about the adjournment and consequently there is default in appearance, the dismissal of the suit must be set aside as plaintiff has sufficient cause for non-appearance within R. 9.

Simple point.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 108 (5)

(*Calcutta*)

CUMING AND GREGORY, JJ.

Belait Ali and *others*—Petitioners.

v.

Hari Prosad Moitra and *others*—Opposite Parties.

Civil Rule No. 670 of 1925, Decided on 5th August 1925, from an order of the Dist. J., Birbhoom, D/- 20th May 1925.

Civil P. C., O. 9, R. 13—R. 13 applies to proceedings under S. 95, Bengal Tenancy Act, by virtue of Civil P. C., S. 141—Bengal Tenancy Act (1885), *S. 95.*

Proceedings in connexion with the appointment of a common manager under S. 95 of the Bengal Tenancy Act come within the purview of S. 141, Civil P. C., so it is quite clear that O. 9, R. 13, does apply to such proceedings : 43 *Cal.* 986, *Foll.*

Simply follows 43 *Cal.* 986.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 109 (1)

(*Lahore*)

CAMPBELL, J.

Umrao Singh and *another*—Judgment-debtors—Defendants—Appellants.

v.

Beni Parshad-Mehr Chand—Decree-holders—Plaintiffs—Respondents.

Miscellaneous First Appeal No. 720 of 1925, Decided on 26th November 1925, from an order of the Sub-J., 1st Class, Lahore, D/- 22nd January 1925.

Limitation Act, Art. 166—*Limitation under Art.* 166 *cannot be extended under S.* 5—*Limitation Act, S.* 5.

The period prescribed under Art. 166 cannot be enlarged under the provisions of S. 5 of the Limitation Act or otherwise, but presumably it can be enlarged under S. 18 of the Limitation Act.

Covered by S. 5.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 109 (2)

(*Madras*)

RAMESAM, J.

Rajambal Ammal—Petitioner.

v.

Appasamy—Respondent.

Civil Revision Petition No. 633 of 1925, Decided on 19th July 1926, from the order of the Dist. Munsif, Villupuram, D/- 22nd July 1925, in I. A. No. 180 of 1925.

Civil P. C., O. 9, R. 13—Ex parte decree setting aside—Civil P. C., S. 151.

A Court cannot set aside an ex parte decree on grounds other than those mentioned in O. 9, R. 13 : 43 *Mad.* 94 (*F. B.*), *Foll.*

Simply follows 43 *Mad.* 94 (*F. B.*).

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 109 (3)

(*Lahore*)

ADDISON, J.

Mt. Fatima Bibi—Decree-holder—Petitioner.

v.

Abdul Raoof Khan — Judgment-debtor—Respondent.

Civil Revision No. 726 of 1925, Decided on 18th February 1926, from the order of the Senior Sub-J., Rohtak, D/- 20th August 1925.

Execution—Decree binding—Executing Court cannot go behind the decree and cannot refuse to execute it until it is set aside.

A Court executing a decree must take th decree as it stands and has no power to go behind the decree. Until that decree is satisfied according to law or is set aside, it stands and the executing Court cannot refuse to execute it.

Too common point : *See A. I. R.* 1924 *All.* 689 ; 1922 *Bom.* 195 ; 46 *Bom.* 503 ; 44 *All.* 659 ; *A. I. R.* 1924 *Lah.* 615 and 448 ; 64 *P. L. R.* 1922 ; 35 *P. R.* 1900 60 *P. L. R.* 1919.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69 73 and 81.

A. I. R. 1926 Journal 109 (4)

(*Allahabad*)

KANHAIYA LAL AND BOYS, JJ.

(*Bohra*) *Natha Mal*—Objector—Appellant.

v.

Jhunai Lal—Decree-holder—Respondent.

Execution First Appeal No. 458 o 1925, Decided on 3rd March 1926, from a decree of the Sub-J., Aligarh, D/- 21st July 1925.

Limitation Act, S. 6—*Minority is no defence when time begins before minor's birth.*

A person cannot take advantage of his minority when limitation has already begun to run before his birth : *A. I. R.* 1925 *P. C.* 33, *Foll.*

Simply follows A. I. R. 1925 *P. C.* 33.

See also Law Reporting Rules : *A. I, R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 112 (1)

(*Lahore*)

ADDISON, J.

Balla Mal—Decree-holder—Appellant.

v.

Agha Din Gul and *another*—Judgment-debtor and Creditor—Respondents.

Mis. First Appeal No. 1090 of 1925, Decided on 16th February 1926, from an order of the Senior Sub-J., Amritsar, D/- 28th April 1925.

Civil P. C., S. 115—*Other remedy open—Revision does not lie.*

In revision High Court will not interfere if another remedy by way of regular suit is open to the aggrieved party : 72 *P. R.* 1918, *Foll.*

Follows 72 *P. R.* 1918.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 112 (2)

(*Oudh*)

RAZA, J.

Sarda Bux Singh—Defendant—Appellant.

v.

Kandhia Bux—Plaintiff—Respondent.

Second Appeal No. 25 of 1925, Decided on 25th November 1925, from a decree of the Sub-J., Partabgarh, D/- 26th September 1924.

(*a*) *Mortgage—Redemption—Mortgage money in dispute—Dismissal of suit for redemption is not justified.*

Where there is a real dispute as to the amount due and the mortgagor tenders what turns out to be an insufficient amount or makes no tender at all, his suit for redemption should not be dismissed on the ground that no tender was made : 5 *O. C.* 127, *Foll.*; 4 *O. L. J.* 334, *Dist.*

(*b*) *Mortgage—Interest—Court cannot reduce contract rate only on the ground of its betng excessive.*

A Court has no power to reduce the contract rate of interest solely on the ground that it is excessive ; *A. I. R.* 1923 *Oudh* 8, *Foll.* 1 *O. L. J.* 263, *Dist.*

(*a*) *Follows* 5 *O. C.* 127.

(*b*) *Follows A. I. R.* 1923 *Oudh* 8.

See also Law Reporting Rules : *A. I. R.* 1929 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 112 (3)

(*Calcutta*)

CUMING, J.

Jogendra Nath Kar—Petitioner.

v.

Subhir Chandra Roy and *others*—Opposite Parties.

Civil Rule No. 932 of 1925, Decided on 26th January 1926, from an order of the 2nd Munsif, Taluk, in Rent Execution Case No. 297 of 1924.

Civil P. C., S. 115—*Error of law is no ground for revision.*

An error of law in coming to a decision is no ground for revision where the decision is come to in exercising jurisdiction vested by law.

Common point. See *A.I.R.* 1924 *A.* 691; *A. I. R.* 1923 *A.* 465 (2); *A. I. R.* 1922 *A.* 441 (1); *A, I. R.* 1923 *C.* 322 (1); *A.I.R.* 1923 *Cal.* 280 ; *A. I. R.* 1926 *Lah.* 47 (1); *A. I. R.* 1924 *L.* 666.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 112 (4)

(*Lahore*)

ADDISON, J.

Mangal Singh and *others*—Convicts—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1070 of 1925, Decided on 9th February 1926, from an order of the Dist. Mag., Lahore, D/- 12th October 1925.

(*a*) *Criminal P. C., S.* 154—*Accused known to complainant—Inclusion of their names in first information report as suspects has no weight.*

Where complainant previously knew the accused and in the first information report their names are mentioned not as persons who were identified at the spot but only as suspects whose conversation asking others to come that night was overheard the evening before, the inclusion of their names in the first information report, carries no weight.

(*b*) *Criminal trial—Identification.*

Identification of accused not previously known on a dark night has no value.

Simple points.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 113 (1)

(*Nagpur*)

KINKHEDE, A. J. C.

Pundlik Diwakar— Plaintiff—Appellant.

v.

Urkuda and *another*— Defendants—Respondents.

Second Appeal No. 284-B of 1925, Decided on 30th August 1926, from the decree of the Addl. Dist. J., Amraoti, D/- 22nd April 1925, in Civil Appeal No. 287 of 1924.

Evidence Act, S. 116—*Lessee cannot repudiate lessor's title unless he has surrendered possession—Landlord and tenant.*

Unless the lessee surrenders possession to the lessor he is bound by estoppel under S. 116 and cannot repudiate his landlord's title and set up title in another person : 37 *All.* 557 (*P. C.*) ; 38 *All.* 226 and 41 *All.* 654, *Foll.*

Follows 37 *All.* 557 (*P. C.*).

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. . R. 1926 Journal 113 (2)

(*Lahore*)

SHADI LAL, C. J.

Abdul Satar and *another*—Accused—Petitioners.

v.

Udha Lal and *another*—Complainants—Opposite Party.

Criminal Reference No. 1010, of 1925, Decided on 23rd December 1925, made by the Dist. Mag., Multan, on 6th June 1925.

Criminal P. C., S. 145—*Finding as to possession cannot be revised when there is some evidence to support it.*

The High Court as a Court of revision cannot interfere with the decision of the trial Court on the factum of possession as long as there is evidence in support of that finding ; 14 *O. C.* 400 ; 28 *I. C.* 651 and 43 *I. C.* 401, *Ref.*

If there is material before the Magistrate, he is the only judge as to whether the material is sufficient or not, and if upon the material placed before him he is satisfied that one of the parties is in possession, his order cannot be deemed to be without jurisdiction.

Simple point.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 113 (3)

(*Lahore*)

ADDISON, J.

Mt. Jannat Bibi—Plaintiff—Appellant.

v.

Mt. Sariran and *others*—Defendants—Respondents.

Second Appeal No. 1042 of 1925, Decided on 20th February 1926, from a decree of the Dist. J., Hoshiarpur, D/- 5th February 1925.

Limitation Act, Arts. 142 *and* 144—*Suit based on dispossession is governed by Art.* 142 *and not by Art.* 144.

A suit for possession on the ground that the plaintiff has been in possession by using the site up to two years before suit when the defendant built a wall and ousted her, is governed by Art. 142 and not 144.; 16 *C.* 743 (*P. C.*), *Foll.*; 41 *A.* 669 ; 39 *M.* 617 ; *A. I. R.* 1922 *P. C.* 181, *Dist.*

Follows I. L. R. 16 *C.* 743 (*P. C.*).

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 113 (4)

(*Lahore*)

ZAFAR ALI, J.

Jalal and *others* — Accused—Appellants.

v.

The Crown—Opposite Party.

Criminal Appeal No. 999 of 1925, Decided on 8th December 1925, from the order of the S. J., Shahpur, D/- 17th August 1925.

Penal Code, S. 304 (2)—*Prosecution witnesses not impartial—Their story false—Accused's injuries not explained—Convictions should be set aside.*

When the prosecution witnesses are not impartial and the story put forward by them is palpably false and does not explain injuries caused to the accused, the High Court should set aside the convictions of the accused under S. 304 (2).

On facts.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

S. N. Das
Advocate High Court
Jammu & Kashmir

Criminal P. C., Ss. 476 *and* 195—*Penal Code, S.* 193—*Sanction for offence under S.* 193, *Penal Code.*

A Court is not justified in making a complaint of perjury regarding a statement which is literally and strictly speaking true.

Simple point.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 116 (1)

(*Calcutta*)

CUMING AND B. B. GHOSE, JJ.

Bahadur Ahmed Moulavi—Defendant No. 1—Appellant.

v.

Hemanta Kumar Roy and *others*—Plaintiffs—Respondents.

Appeal No. 2272 of 1923, Decided on 3rd December 1925, from the appellate decree of the Sub-J., Jessore, D/- 1st May 1923.

Bengal Tenancy Act, S. 3 (9)—*Undivided portions of land cannot constitute a holding.*

Where undivided portions of land have been included within the leasehold, the tenancy cannot be said to comprise a holding as defined in the Bengal Tenancy Act: 25 *Cal.* 917, *Foll.*

Simply follows 25 *Cal.* 917.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 116 (2)

(*Lahore*)

FFORDE, J.

Abdul Aziz—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1110 of 1925, Decided on 12th March 1926, from the order of the Mag. 1st Cl., Lyallpur, D/- 30th September 1925.

(*a*) *Evidence Act, S.* 30—*Statement not showing that any offence was committed, is not a confession.*

Where in a Dhatura poison case one of the co-accused stated that his co-accused brought milk and mixed some powder in it, but he did not know what that powder was and that his co-accused gave the milk to the deceased to drink,

Held: that the statement is not a confession.

(*b*) *Penal Code, Ss.* 328 *and* 304 *II—Accused having no knowledge of the activities of his co-accused—Simple association with co-accused is not sufficient for conviction.*

Mere association of an accused with his co-accused is not sufficient to base conviction, when it is found that he was not aware exactly about their activities although his association raises a strong suspicion of his guilt.

On facts and simple points.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 116 (3)

(*Patna*)

JWALA PRASAD AND BUCKNILL, JJ.

Manjhil Lal Biswanath Sah Deo—Plaintiff—Appellant.

v.

Shaikh Mohiuddin—Defendant—Respondent.

Appeal No. 853 of 1924, Decided on 13th July 1926, from the appellate Decree of the J. C., Chota Nagpur, D/- 25th March 1924.

Landlord and tenant—Usufructuary mortgage by landlord of his tenancy lands—Mortgagee settling lands with tenants—Tenants acquiring occupancy rights—Landlord cannot eject tenants after satisfying mortgage.

Where the landlord grants a usufructuary mortgage of tenancy land and the mortgagee settles the land with tenants, the tenants, after they have acquired occupancy rights, cannot be ejected by landlord after the mortgage is redeemed: *A. I. R.* 1926 *Pat.* 605, *Foll.*

Simply follows A. I. R. 1926 *Pat.* 605.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 116 (4)

(*Lahore*)

FFORDE, J.

Kala and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1197 of 1925, Decided on 12th February 1926, from an order of the Mag., 1st Cl., Rawalpindi, D/- 9th November 1925.

Criminal trial—Evidence—Failure by witness to disclose deceased's death until asked by police makes his evidence incredible.

Where a witness does not inform anyone, of what he saw until a Sub-Inspector of Police

came on the scene, although in the meantime he had been in company with the Head Constable, had gone to the hospital with the deceased, was present when the inquest report was made, yet one word did he not say to any one until some 15 days after the death of the deceased,

Held: that it will be very unsafe to accept the evidence of such a witness.

Simple point.

See also Law Reporting Rules: *A. I, R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 117 (1)

(*Lahore*)

JAI LAL, J.

Ganda Singh—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1200 of 1925, Decided on 8th February 1926, from the order of the S. J., Hissar, D/- 14th November 1925.

Penal Code, Ss. 302 and 304—Case doubtful—Conviction on complainant's evidence alone is unsafe.

In a case under Ss. 302 and 304 two out of three eye-witnesses on behalf of the prosecution, one being complainant himself, were disbelieved by the Sessions Judge: a prosecution witness also alleged to be an eye-witness by accused, was not produced by the prosecution but appeared as a defence witness and denied that an assault was committed by the accused as alleged; medical evidence showed that one of the injuries on the body of the deceased was ante-mortem, the other may or may not have been so, and that the injury resulting in the death of the deceased might have been caused by a fall on a hard substance, and there was admittedly bitter enmity between the parties

Held: that the case was a doubtful one and it was not safe to convict the accused on the evidence of complainant alone.

Simply on facts.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 117 (2)

(*Lahore*)

JAI LAL AND DALIP SINGH, JJ.

Ranga Singh and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 225 of 1926, Decided on 20th May 1926, from an order of the S.J., Lahore, D/- 8th February 1926.

Criminal trial—Main evidence very discrepant—Conviction should not be based on mere track evidence.

It is impossible to base a conviction merely on track evidence when the main evidence is extremely discrepant and unsatisfactory.

Simple point.

See also Law Reporting Rules: *A. I. R.* 1926, *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 117 (3)

(*Oudh*)

NEAVE, J. C.

Upadhiya—Plaintiff—Appellant.

v.

Lalay—Defendant—Respondent.

First Appeal No. 31 of 1924, Decided on 8th October 1925, against the decree of the Sub-J., Gonda, D/- 16th January 1924.

Pre-emption—Non-compliance with the decree by plaintiff makes him lose his right of pre-emption—Appeal from such decree is incompetent.

In a pre-emption suit, when a plaintiff does not deposit the amount decreed within the time fixed, he loses the right of pre-emption and an appeal against the decree is not competent: *A. I. R.* 1924 *Oudh* 102 *Foll.*

Follows A. I. R. 1924 *Oudh* 102.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 117 (4)

(*Lahore*)

ADDISON, J.

Waryam Singh and *others*—Convicts—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1246 of 1925, Decided on 20th March 1926, from an order of the 1st Cl. Mag., Amritsar, D/- 25th November 1925.

Penal Code, S. 402—Accused found assembled, fully prepared for dacoity can be convicted.

Where the accused are caught at a lonely well at a long distance from their respective homes in different villages fully armed and equipped for committing a dacoity, their conviction under S. 402 is competent: 6 *P. R.* 1916; *A. I. R.* 1925 *All.* 62 and 23 *All.* 124, *Appl.*

On facts.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 118 (1)

(*Allahabad*)

WALSH AND KANHAIYA LAL, JJ.

Mohammad Yaqub Shah Khan—Plaintiff—Appellant.

v.

Har Prasad and *another* — Defendants—Respondents.

Second Appeal No. 1433 of 1925, Decided on 12th January 1926, from a decree of the Sub-J., Shahjahanpur, D/- 27th April 1925.

Wajib-ul-arz—Pre-emption provided by wajib-ul-arz.

Where the wajib-ul-arz provides that the right of pre-emption shall be enforceable without mentioning the incidents comprised therein, the implication is that the right of pre-emption is enforceable subject to the general rules of the Mahomedan Law unless evidence is given to prove otherwise : 9 *All.* 513, *Foll.*

Simply follows 9 *All.* 513.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 118 (2)

(*Lahore*)

ADDISON, J.

Muhammad Akbar — Plaintiff — Appellant.

v.

Mt. Hussein Bibi—Defendant—Respondent.

Misc. First Appeal No. 1538 of 1925, Decided on 11th May 1926, from an order of the Senior Sub-J., Amritsar, D/- 11th May 1925.

(*a*) *Guardians and Wards Act, S.* 41 (3) *and S.* 47

No appeal lies from an order under S. 41 (3).

(*b*) *Civil P. C., S.* 115—*Other remedy open.*

Revision will not lie where there is another remedy open by way of appeal at a later stage of the proceedings.

(*a*) *is explained by S.* 47 *itself.*

(*b*) *is very common point* : See *A. I. R.* 1925 *All.* 267; *A.I.R.* 1925 *Lah.* 191, *A. I. R.* 1924 *Lah.* 471 ; *A. I. R.* 1922 *Lah.* 63 ; *A. I. R.* 1925 *Mad.* 886.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53. 61 69, 73 and 81.

A. I. R. 1926 Journal 118 (3)

(*Oudh*)

MISRA, J.

Mahant Dass—Plaintiff—Appellant.

v.

Ram Ghulam — Defendant — Respondent.

Second Appeal No. 449 of 1924, Decided on 3rd March 1926, from the judgment of the 1st Sub-J., Bahraich, D/- 4th August 1924, in Civil Appeal No. 26 of 1923.

Landlord and tenant—Abadi—Tenants having an interest in the village abadi, cannot be ejected from the site of their house.

Where the tenants possess an interest in the village, the landlord is not entitled to eject them from the site of their house in the abadi of the village ; 21 *O. C.* 257, *Foll.*

Follows 21 *O. C.* 257.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69. 73 and 81.

A. I. R. 1926 Journal 118 (4)

(*Rangoon*)

DUCKWORTH AND MAUNG GYI, JJ.

Maung Twa—Accused—Appellant.

v.

King-Emperor—Opposite Party.

Criminal Appeal No. 1438 of 1925, Decided on 27th November 1925, from the order of the S. J., Hanthawaddy, in Sessions Trial No. 19 of 1925.

(*a*) *Penal Code, S.* 302—*Joint attack by two.*

Where the appellant and his son jointly attacked the deceased and it resulted in death, the accused were rightly convicted for murder.

(*b*) *Penal Code, S.* 34—*Several accused—Act done in furtherance of common intention—Each is liable.*

Section 34 deals with the doing of separate acts, similar or diverse, by several persons ; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself ; *A.I.R.* 1925 *P. C.* 1 *Foll.*

(*c*) *Penal Code, S.* 33—*Act includes omission.*

A " criminal act " includes an omission to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes.

(*a*) *Simple and common point.*

(*b*) *Follows A. I. R.* 1925 *P. C.* 1.

(*c*) *Covered by S.* 33, *I. P. C.*

See also Law Reporting Rules : *A.I.R. Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 119 (1)

(*Lahore*)

CAMPBELL, J.

Nizam Din—Convict—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 1542 of 1925, Decided on 19th March 1926, from the order of the Dist. Mag. Ferozepur, D/- 3rd September 1925.

Criminal P. C., S. 345 (5*A*)—*Compromise.*

Compromise is allowed in revision.

Section 345 (5-*A*) *is clear.*

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 119 (2)

(*Lahore*)

MARTINEAU, J.

Mt. Hussain Bibi—Judgment-debtor—Appellant.

v.

Nur Hussain Shah and *others*—Decree-holders—Respondents.

Misc. First Appeal No. 1576 of 1925, Decided on 19th January 1926, from an order of the Dist. J., Lahore, D/- 1st May 1925.

(*a*) *Mahomedan Law—Wakf institution is distinct from property attached to it—Removal of gaddinashin does not imply physical dispossession from property of institution.*

The wakf institution is something distinct from the wakf property attached to the institution, and so the mere removal of a gaddinashin from office as trustee does not imply his physical dispossession from the property of the institution : 56 *P. R.* 1895 and 95 *P. R.* 1916, *Foll.*

(*b*) *Execution—Decree binding.*

An executing Court cannot give a relief which is not given by the decree itself.

(*a*) *Follows* 56 *P. R.* 1895 *and* 95 *P. R.* 1916.

(*b*) *Too common a point : See A. I. R.* 1924 *All.* 689; *A. I. R.* 1922 *Bom.* 195; 46 *Bom.* 503; 44 *All.* 659; *A. I. R.* 1924 *Lah.* 615 and 448 ; 64 *P. L. R.* 1922 ; 35 *P. R.* 1900 ; 60 *P. L. R.* 1919.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73, and 81.

A. I. R. 1926 Journal 119 (3)

(*Lahore*)

SHADI LAL, C. J.

Sher Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 1643 of 1925, Decided on 19th February 1926, from an order of the Dist. Mag., Gujranwala, D/- 3rd July 1925.

Criminal P. C. (*amended* 1923), *S.* 436—*Further enquiry is improper unless order of discharge is manifestly perverse.*

Generally speaking further enquiry after discharge is improper, unless the order of discharge is manifestly perverse or foolish or incomplete : 10 *P. R.* 1911 *Cr.* (*F. B.*), *Foll.*

Follows 10 *P. R.* 1911 *Cr.*

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 119 (4)

(*Lahore*)

ADDISON, J.

Narain Das and *another*—Defendants—Appellants.

v.

Khushi Ram and *another*—Plaintiff & Defendant—Respondents.

Second Appeal No. 1680 of 1925, Decided on 9th February 1926, from the decree of the Dist. J., Gujranwala, D/- 25th March 1925.

Civil P. C., S. 35—*Question as to costs—Second appeal lies if question of law or principle is involved or discretion is exercised arbitrarily.*

A second appeal does lie on a matter of costs if there is a question of law or principle involved or when the lower Court has exercised its discretion as to costs arbitrarily and not according to general principles.

Common point : see 15 *All.* 333 ; 12 *Cal.* 179 ; 12 *Cal.* 271 ; *A. I. R.* 1925 *Cal.* 297 ; *A. I. R.* 1923 *Bom.* 37 ; *A. I. R.* 1925 *Cal.* 1085 ; 35 *C. L. J.* 156 ; *A. I. R.* 1922 *Lah.* 229 ; *A. I. R.* 1925 *Oudh* 699 ; *A. I. R.* 1924 *Oudh* 110.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal* pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 120 (1)

(*Allahabad*)

SULAIMAN AND MUKERJI, JJ.

Gajadhar—Judgment-debtor — Appellant.

v.

Kishori Lal—Decree-holder—Respondent.

Execution Second Appeal No. 1129 of 1925, Decided on 31st May 1926, from a decree of the 4th Addl. Sub-Judge, Aligarh.

Easements Act, S. 23—Person acquiring right of easement should not extend it so as to cast additional burden on the servient heritage.

A dominant owner may from time to time alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage. When a person acquires a right of easement for the outlet of water it may be of a limited kind. He should not be allowed to increase the extent or alter the mode of enjoyment so as to cast an additional burden on the servient heritage.

S. 23 is clear.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69; 73 and 81.

A. I. R. 1926 Journal 120 (2)

(*Lahore*)

DALIP SINGH, J.

Lachhman Singh—Appellant.

v.

Ram Das and *others*—Respondents.

Misc. First Appeal No. 1489 of 1925, Decided on 3rd December 1925, from an order of the Dist. J., Gurdaspur, D/- 25th May 1925.

Provincial Insolvency Act, S. 16 (2) (a)—Insolvent's land can be mortgaged.

Court has jurisdiction to mortgage insolvent's land but ordinarily such a course should not be adopted ; *A. I. R.* 1921 *Lah.* 44, *Foll.*

Simply follows A. I. R. 1921 *Lah.* 44.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 120 (3)

(*Lahore*)

DALIP SINGH, JJ.

Hira and *another*—Defendants — Appellants.

v.

Ram Singh and *others* — Plaintiffs—Respondents.

Misc. Second Appeal No. 1691 of 1925, Decided on 16th January 1926, from the order of the Dist. J., Jullundur, D/- 14th May 1925.

Limitation Act, Art. 120—Right to sue — Accrual.

One B was the owner of some land together with a share in the shamilat. After B's death there was a dispute about the ownership of the land left by him. The reversioners of B and the defendants entered into a compromise by which the reversioners took the share of the shamilat land leaving some land out of the shamilat for the use of the defendants. The revenue records, however, showed the defendants' names alone as in possession and ownership of the shamilat. In 1909 on a suit brought, it was held that the compromise was a good one and that the plaintiffs were entitled to the shamilat subject to the right of the defendants to have a portion of the shamilat set aside for their use. In 1914 the plaintiffs applied accordingly to have the entries in the revenue records corrected. The defendants objected that they had not been given their share out of the shamilat for the purposes given in the compromise. The plaintiffs then alleged that the defendants had been given the two numbers in dispute in accordance with the terms of the compromise. The defendants contended that these two numbers belonged to them and had not been given to them under the terms of the compromise. The result was that the revenue authorities again referred the parties to a civil snit to determine their rights. No such suit was brought by the plaintiffs and defendants appear to have continued to possess and cultivate one of the numbers of area 2 kanals 13 marlas. In 1916 the plaintiffs caused a notice of ejectment to issue against the defendants as regards the field measuring 2 kanals 13 marlas. The order was again set aside, and the plaintiffs were directed to bring a civil suit if so advised. No such suit was again brought. The plaintiffs again in 1923 brought a suit in the civil Courts askiug for a declaration that the numbers in question belonged to them.

Held : that the cause of action was exactly the same as it was in 1914, and as no cause of action has accrued to the plaintiffs, the suit was barred.

On facts.

See also Law Reporting Rules : *A. I. R.* 1926, *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 121 (1)

(*Calcutta*)

B. B. GHOSE, J.

Adat Mani Namasudrani and *another* —Petitioners.

v.

Purna Chandra Malangi and *others*—Opposite Parties.

Civil Rule No. 1195 of 1925, Decided on 20th May 1926, against an order of the Sub-J., Khulna, in Miscellaneous Appeal No. 147 of 1924.

Civil P. C., O. 21, R. 90 — Application under R. 90 dismissed for default—Order refusing restoration is not appealable.

An appeal does not lie from an order refusing to restore an application made by judgment-debtor under O. 21, R. 90, dismissed for default : 17 *All.* 106 (*P. C.*) and *A. I. R.* 1926 *Cal.* 773, *Foll.*

Simply follows A. I. R. 1926 *Cal.* 773 and 17 *All.* 106 (*P. C.*).

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 121 (2)

(*Lahore*)

DALIP SINGH, J.

Lakshmi Chand and *another* — Plaintiffs—Appellants.

v.

Mukta Parshad and *others*—Defendants —Respondents.

Misc. Second Appeal No. 1748 of 1925, Decided on 16th January 1926, from an order of the Dist. J., Ambala, D/- 8th April 1925.

(*a*) *Civil P. C., O. 10, R. 1 — Statement of facts not disputed in pleading—Examination of parties is unnecessary.*

O. 10, R. 1, only makes it obligatory on the Court to examine the parties where there is no clear express or implied denial of any statement of fact in the pleadings. Where the plaintiff has put in a written replication covering all statements of fact referred to in the written statement, there is no occasion for the Court to examine the parties or their pleaders.

(*b*) *Witness — Examination of — Duty of Court.*

It is not the duty of the Court to direct the party as to the order in which he is to lead his witnesses.

(*a*) *Covered by the rule.*

(*b*) *Simple point.*

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 121 (3)

(*Calcutta*)

C. C. GHOSE AND DUVAL, JJ.

Ram Chandra De and *another*—Applicants.

v.

Gajendra Nath Das—Opposite Party.

Criminal Revision No. 1016 of 1925, Decided on 7th January 1926, from the order of the S. J., 24-Perganas, D/- 12th November 1925.

Penal Code, S. 420—Case of civil nature is not covered by the section.

The complainant sold two huts to the accused for a sum of Rs. 150. Out of the consideration to be paid a sum of Rs. 47 was to be set off on account of a debt which the complainant owed to the accused and the balance was to be paid to the complainant by the accused on the execution of the document. The accused got the kobala executed and registered but failed and neglected to pay the balance of the consideration.

Held : that the dispute was of a civil nature and was not one covered by S. 420.

Simply on facts.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 121 (4)

(*Lahore*)

DALIP SINGH, J.

Sarup Singh—Plaintiff—Appellant.

v.

Sant Singh and *others*—Defendants and Plaintiff—Respondents.

Second Appeal No. 1484 of 1925, Decided on 3rd June 1926, from a decree of the Dist. Judge, Ambala, D/- 1st March 1925.

Civil P. C., O. 22, Rr. 11 and 4—Suit against whole proprietary body of village — Appeal — Some respondents' legal representatives not impleaded in time—Appeal abates in toto.

In a suit for possession of land and house site against the whole proprietary body of a village on the ground that the plaintiffs were entitled to them as successors of the last holder, where some of the respondents to an appeal against the decree in such suit die and their representatives are not brought on record in time, the appeal abates in toto ; 62 *P. R.* 1913 and 2 *L. L. J.* 442, *Foll.*

Merely follows 62 *P. R.* 1913.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 122 (1)

(Allahabad)

DANIELS, J.

Suraj Prasad—Plaintiff—Appellant.

v.

Maheshwari Prasad — Defendant — Respondent.

Second Appeal No. 1821 of 1925, Decided on 8th February 1926, from a decree of the Small Cause Court J., Allahabad, D/- 22nd April 1925.

(a) *Evidence Act, S. 92—Scope.*

Subsequent oral agreement between A and C varying terms of deed between A and B is provable by C against A.

(b) *Easement—Creation of.*

Neither registration nor a written instrument is necessary for the creation of an easement : 31 *All.* 612, *Foll.*

(a) *Covered by the section.*

(b) *Simply follows* 31 *All.* 612.

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 122 (2)

(Lahore)

ADDISON, J.

Nathu Ram and *another*—Plaintiffs—Appellants.

v.

Municipal Cimmittee, Muktsar—Defendant—Respondent.

Second Appeal No. 1942 of 1925, Decided on 13th March 1926, from the decree of the Addl. Dist. J., Ferozepore, D/-1st June 1925.

Punjab Municipal Act (3 *of* 1911), *S.* 131—*Demolition of reservoir in good faith does not justify grant of injunction.*

Where in a suit for injunction to restrain the Municipality from preventing plaintiff from rebuilding his reservoir which had been demolished by the Municipality and for damages, the Municipality acted in good faith but its only mistake was that it demolished the reservoir instead of filling it up.

Held ; that the plaintiff is not entitled to the injunction, but is entitled to damages.

Covered by Section 131.

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 122 (3)

(Allahabad)

WALSH, J.

Chaturi Ahir—Plaintiff — Appellant.

v.

Jhinnu Ahir and *another*—Defendants—Respondents.

Second Appeal No. 1937 of 1925, Decided on 15th January 1926, from a decree of the Addl. Sub-J., Azamgarh, D/-31st August 1925.

Agra Tenancy Act (2 *of* 1901), *S.* 22—*One of the coparceners owning occupancy holding does not bring the case under S.* 22.

Where a joint Hindu family owns an occupancy holding, the death of one of the coparceners does not bring about a devolution of tenancy under S. 22 : 42 *All.* 668, *Foll.*

Simply follows 42 *All.* 668.

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 122 (4)

(Lahore)

CAMPBELL, J.

Ghasita—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Reference No. 1871 of 1925, Decided on 29th January 1926, made by the Dist. Mag. Sheikhupura.

Penal Code, S. 334—*Striking blow under provocation cannot be said not to be an offence.*

It is wrong to say that no offence is committed by an accused person who strikes a blow under provocation.

Covered by Section.

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 122 (5)

(Calcutta)

CUMING AND GREGORY, JJ.

Official Trustee of Bengal—Plaintiff—Appellant.

v.

Adhar Bera and *others*—Defendants—Respondents.

Appeal No. 2206 of 1923, Decided on 18th August 1925, from the appellate decree of the Dist. J., Midnapur, D/-25th June 1923.

Civil P. C., O. 22, Rr. 2 and 4—Rent-decree—Death of one of tenants respondents—Non-substitution causes no wholesale abatement.

Where in appeal from a rent-decree by the landlord against the heirs of a deceased tenant, one of the respondents dies and his legal representative is not brought on record within time, the appeal abates only partially and it can be proceeded with against the surviving respondents : *A. I. R.* 1925 *Cal.* 1056 (*F. B.*), *Foll.*

Simply follows A. I. R. 1925 *Cal.* 1056 (*F. B.*). *and a common point.*

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 123 (1)

(*Lahore*)

SHADI LAL, C. J.

Allah Jawaya and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revision Petition No. 2004 of 1925, Decided on 12th March 1926, from an order of the Dist. Mag., Ferozepore, D/-7th September 1925.

Criminal P. C., S. 522—Accused fencing land and preventing complainant by show of force from taking possession—Restoration is justified.

Where the complainant shows that the accused were putting a fence round the land when complainant arrived there and that they prevented him from taking possession by show of force order under S. 522 is justifiable.

Covered by Section.

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 123 (2)

(*Allahabad*)

LINDSAY, J.

Chandan and *others* — Accused — Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1043 of 1925, Decided on 10th February 1926, from an order of the S. J., Muttra, D/-21st November 1925.

Penal Code, Ss. 34 and 304—Joint attack with lathis by accused—Fracture of the skull, resulting in death, caused—Offence is under S. 304.

Where the accused, in furtherance of their common intention, struck the deceased with lathis and a fracture of the skull resulting in death is caused by one of the blows, the accused are guilty of an offence under S. 304, even though it cannot be ascertained which of the blows was fatal : 52 *Cal.* 997 and *A. I. R.* 1925 *P. C.* 1, *Fol.*

Simply follows A. I. R. 1925 *P.C.* 1 and 52 *Cal.* 997.

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 123 (3)

(*Lahore*)

SHADI LAL, C. J.

Sanwalya—Complainant—Petitioner.

v.

Baru—Accused—Respondent.

Criminal Revision No. 2068 of 1925, Decided on 12th March 1926, reported by the S. J., Karnal, on 16th December 1926.

Criminal P. C., S. 250—Zaildar's report and some witnesses supporting complaint—No rebuttal by accused—Complaint is not false and vaxatious.

In the presence of depositions of some of the witnesses and the Zaildar's report supporting the complaint and in the absence of rebuttal by the accused, it is impossible to hold that the complaint is false and vexatious or frivolous.

Simply on facts.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 123 (4)

(*Calcutta*)

WALMSLEY AND CHAKRAVARTY, JJ.

Dharanidhar Bhandari— Defendant No. 1—Appellant.

v.

Sm. Hemangini Dasi and *others* — Plaintiff and Defendants 2 and 3 — Respondents.

Appeal No. 6 of 1924, Decided on 9th March 1926, from the appellate decree of the 1st Sub-J., Midnapore, D/- 18th July 1923.

Civil P. C., S. 11—*Co-defendant—Question of title of one defendant incidentally raised in a previous rent suit—Decision does not bar a second suit to establish title by one of the co-defendants in previous suit.*

Where the issue raised in a previous rent suit only incidentally raised the question of a co-defendant's title and the question of title as between the co-defendants was neither directly nor substantially in issue in the previous suit, the decision of such an issue incidentally raised in the previous suit cannot be treated as res judicata when the question is directly and substantially in issue between these co-defendants in a subsequent suit : 11 *Cal.* 301 (*P. C.*) and 12 *Cal.* 580 (*F. B.*), *Foll.*

Simply follows 11 *Cal.* 301 (*P. C.*) and 12 *Cal.* 580 (*F. B.*).

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 124 (1)

(*Lahore*)

ADDISON, J.

Karamat Ullah Khan—Defendant—Appellant.

v.

Ghulam Nabi and *another*—Defendants—Respondents.

Second Appeal No. 2177 of 1925, Decided on 5th May 1926, from a decree of the Addl. Dist. J., Ferozepore, D/- 6th May 1925.

(*a*) *Bengal Land Redemption and Foreclosure Regulation* (17 *of* 1806)—*Defect in foreclosure proceedings does not affect relation between mortgagor and mortgagee.*

If the foreclosure proceedings are defective, they do not affect the relations between the mortgagor and the mortgagee, and if the mortgagee is in possession as such continues in possession as mortgagee : 65 *P. R.* 1908, *Foll.*

(*b*) *Bengal Land Redemption and Foreclosure Regulation* (17 *of* 1806)—*Court will not presume observance of formalities of notice.*

A Court will not presume that all formalities have been duly observed in issuing notice under the regulation. A District Judge acting under the Regulation does so not in a judicial, but in a ministerial capacity, and it is for the mortgagee to prove affirmatively the due performance of every condition necessary to be established before the foreclosure can attach upon the estate : 16 *P. R.* 1888 ; 106 *P. R.* 1889 and 46 *P. R.* 1907, *Foll.*

(*a*) *Follows* 65 *P. R.* 1908.

(*b*) *Follows* 16 *P. R.* 1888 ; 106 *P. R.* 1889 and 46 *P. R.* 1907.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 124 (2)

(*Madras*)

ODGERS, J.

Narayana Nadan and *others*—Petitioners.

v.

Nallathambi Nadan—Respondent.

Civil Revision Petitions Nos. 900 to 999 of 1923, Decided on 1st September 1925, from the orders of the Dist. Munsif, Paramakudi, in O. P. Nos. 16, 19 to 25, 27 and 38 of 1923.

Civil P. C., S. 115—*Revision.*

Court's following a decision of another High Court, (which was also followed by its own High Court), does not invite interference under S. 115.

Simple point.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 124 (3)

(*Lahore*)

JAI LAL, J.

(*Bibi*) *Atar Kaur* and *another*—Appellants.

v.

Sodhi Singh—Opposite Party.

Miscellaneous First Appeal No. 2370 of 1925, Decided on 10th April 1926, from the order of the Dist. J., Ferozepore D/- 21st July 1925.

Guardians and Wards Act, S. 39—Guardian of property—Uncle, where interests are adverse to those of the minor, cannot be appointed in preference to mother or grandmother simply because disputes would arise if he is not appointed.

The uncle of the minor applied for being appointed the guardian of his minor nephew in place of his mother and grandmother acting jointly. His application was granted by the District Judge in spite of the decision of his predecessor that the interests of the uncle were adverse to those of the minor. The reasons why the uncle's petition was granted were that after the appointment of the mother and the grandmother serious disputes arose between them, and the uncle :

Held : in appeal that the uncle could not be appointed guardian in view of the decision that his interests were adverse to those of the minor and his subsequent conduct.

Simply on facts.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 125 (1)

(*Lahore*)

ADDISON, J.

Jawahar and *another*— Plaintiffs — Appellants.

v.

Amar Chand and *another*—Defendants —Respondents.

Second Appeal No. 2198 of 1925, Decided on 10th February 1926, from the decree of the Dist. J., Hoshiarpur, D/- 13th May 1925.

Adverse possession—Mortgagee taking possession as owner can obtain title by adverse possession.

Where the mortgagee is not entitled to possession under the deed as mortgagee and actually takes possession claiming to be owner, his possession is not that of a mortgagee, but of a trespasser and he can obtain an indefeasible title by adverse possession for over 12 years : 232 *P. L. R.* 1911 : *A. I. R.* 1923 *Lah.* 495 ; *A. I. R.* 1925 *Lah.* 53, *Foll.* ; 65 *P. R.* 1908, *Dist.*

Follows A. I. R. 1923 *Lah.* 495 and *A. I. R.* 1925 *Lah.* 53.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 125 (2)

(*Oudh*)

ASHWORTH AND GOKARAN NATH MISRA, JJ.

Indarpal Singh—Plaintiff—Appellant.

v.

Kalloo and *another*—Defendants—Respondents.

Second Appeal No. 324 of 1925, Decided on 14th December 1925, from a decree of the Dist. J., Rai Bareli, D/- 4th April 1925.

Civil P. C., S. 100—Finding of fact cannot be disturbed in second appeal.

Where the lower appellate Court came to a finding of fact that there was no evidence which had been produced in the case by the plaintiff sufficient to justify him in shifting the burden of proof on to the other side, the finding of fact arrived at cannot be disturbed in second appeal.

Common point. See A. I. R. 1924 *Cal.* 372; 1925 *Lah.* 333 (2); 1923 *Lah.* 236 (1); 1923 *Lah.* 11 (2); 1925 *Nag.* 271; 24 *O. C.* 221; *A. I. R.* 1925 *Pat.* 384.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 125 (3)

(*Lahore*)

JAI LAL, J.

Smail and *others*—Plaintiffs—Appellants.

v.

Nathu Ram and *others*—Defendants—Respondents.

Second Appeal No. 2262 of 1925, Decided on 12th April 1926, from the decree of the Dist. J., Shahpur, D/- 17th April 1925.

Custom (Punjab)—Alienation—Setting aside.

Where the suit to contest an alienation is collusive and the real plaintiff is the alienor himself though the nominal plaintiffs are his minor sons, the Courts should not grant a decree to set aside an alienation : *A. I. R.* 1925 *Lah.* 24, *Foll.*

Follows A. I. R. 1925 *Lah.* 24.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 125 (4)

(*Lahore*)

ZAFAR ALI, J.

Rahmat Ullah and *others*—Plaintiffs—Appellants.

v.

Nawab and *another*—Defendant and Plaintiff—Respondents.

Second Appeal No. 2408 of 1925, Decided on 12th March 1926, from a decree of the Dist. J., Ludhiana, D/- 4th February 1925.

(*a*) *Possession—Suit for—Plaintiff must prove possession and dispossession within 12 years.*

In a suit for possession the plaintiff cannot succeed without proving possession and dispossession within 12 years : 16 *Cal.* 473 (*P. C.*), *Foll.*

(*b*) *Landlord and tenant—Revenue records showing non-payment of rent by tenants and possession of tenants as that of trespassers—Tenancy is not established.*

Where in the Revenue Records the plaintiffs are shown to be owners and the defendants tenants, but it appears from those very records that the defendants never paid any rent and were in possession as trespassers, the relation of landlord and tenant between the parties is not established.

(*a*) *Follows I. L. R.* 16 *Cal.* 473 (*P. C.*)
(*b*) *Simple point.*

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 126 (1)

(Allahabad)

KANHAIYA LAL AND ASHWORTH, JJ.

Radha Kishen and *another*—Defendants—Appellants.

v.

Sital Prasad—Plaintiff—Respondents.

Second Appeal No. 2271 of 1925, Decided on 10th March 1926, from a decree of the Addl. Sub-J., Muttra, D/- 15th September 1925.

Contract Act, S. 23—Bona fide debt creating civil as well as criminal liability—Pro-note for the debt is valid.

Where a bona fide debt exists and where the transactions between the parties involve a civil liability as well as possibly a criminal act, a promissory note given by the debtor executed for the debt constitutes a valid agreement: 28 *All.* 718, *Foll.*

Simply follows 28 *All.* 718.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 126 (2)

(Lahore)

DALIP SINGH, J.

Miri Mal—Plaintiff—Appellant.

v.

Kanshi Prasad and *another*—Defendants—Respondents.

Miscellaneous First Appeal No. 2665 of 1925, Decided on 15th February 1926, from an order of the Dist. J., Delhi, D/- 19th August 1925.

Guardians and Wards Act, S. 7—Deposit in Bank in minor's name—Maternal uncle resisting father's application on the ground that he held deposit receipts in his name—Father was appointed for withdrawing the deposit.

Father applied to be appointed guardian of his minor son for the purpose of withdrawing certain deposit from a bank in the name of the minor. The money was deposited in the name of grandfather of the minor and the minor and was payable to either or survivor. Maternal uncle of the minor contested the application on the ground that the deposit receipt was entered in his name.

Held: that prima facie as the receipt was payable to either or survivor on the death of the grandfather, the legal interest would pass to the minor, but at any rate it was obviously for the welfare of the minor that he should not be compelled to bring a suit as regards this deposit receipt and it should be left to the parties to establish their title to this receipt in a civil suit. It is not necessary to decide to whom this deposit receipt really belonged.

Held: further that the father should be appointed guardian after furnishing necessary security.

On facts.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 126 (3)

(Lahore)

JAI LAL, J.

The Bombay Baroda and Central India Railway—Defendant—Appellant.

v.

Firm Mulchand-Sanwal Das and *another* — Plaintiffs and Defendant — Opposite Party.

Second Appeal No. 2392 of 1925, Decided on 8th February 1926, from a decree of the Addl. Dist. J., Ferozepore, D/- 13th May 1925.

Civil P. C., S. 100—Wilful neglect is a question of fact.

The finding that there was wilful neglect is a finding of fact and cannot be interfered with in second appeal: *A. I. R.* 1924 *Lah.* 594, *Foll.*

Follows A. I. R. 1924 *Lah.* 594.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 126 (4)

(Allahabad)

KANHAIYA LAL AND ASHWORTH, JJ.

Radha Kant Shukul—Decree-holder—Appellant.

v.

Butai Misir and *others*—Respondents.

Execution Second Appeal No. 918 of 1925, Decided on 8th March 1926, from a decree of the Addl. Sub-J., Ballia, D/- 20th December 1924.

Limitation Act, S. 7—Manager of joint family can give valid discharge even against minor coparcener.

The manager of a joint Hindu family, being member of a joint Hindu family, can give a valid discharge on his own behalf and on that of a minor brother, and therefore the minor cannot take advantage of S. 7: 41 *All.* 435, *Foll.*

Simply follows 41 *All.* 435.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 127 (1)

(*Lahore*)

CAMPBELL, J.

Narain Das—Defendant—Appellant.

v.

Khan Chand—Plaintiff—Respondent.

Second Appeal No. 2232 of 1925, Decided on 17th February 1926, from a decree of the Dist. J., Multan, D/- 30th April 1925.

Specific Relief Act, S. 54—Suit for permanent injunction—Plaintiff's house untenanted and he being away in Government service—No unreasonable delay in protesting against defendant's action.

In a suit for a permanent injunction to remove the obstruction placed by the defendant to the light and air enjoyed by the plaintiff, it was found that the plaintiff's house was untenanted and plaintiff was away in Government service and it was impossible for him to know what was going on in his absence,

Held: that there was no unreasonable delay in protesting against the defendant's action on the part of the plaintiff.

On facts.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 127 (2)

(*Lahore*)

ADDISON, J.

Allah Baksh—Defendant—Appellant.

v.

Fateh Din and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 2778 of 1925, Decided on 15th May 1926, from a decree of the Dist. J., Sialkot, D/- 3rd August 1925.

Custom (Punjab) — Alienation — Necessity—Mortgage for intended marriage of mortgagor is valid and binding—Mortgagee need not see to the application of the money advanced.

A mortgage of ancestral land for the intended marriage of the mortgagor is binding on the reversioners and constitutes necessity and it is sufficient that the lender enquired whether the money was really required, and it is not necessary for him to see to the application of the sum advanced as long as he does not lend more than is reasonable: 65 *P. R.* 1910, *Foll.*

Merely follows 65 *P. R.* 1910.

See also Law Roporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 127 (3)

(*Oudh*)

STUART, C. J., AND WAZIR HASAN, J.

Deputy Commissioner of Hardoi—Defendant—Appellant.

v.

Syed Mairaj Rasul—Plaintiff—Respondent.

Second Appeal No. 382 of 1925, Decided on 24th September 1926, from the decree of the Addl. Dist. J., Lucknow, D/- 28th April 1925.

Grant—Annuity in the nature of maintenance—Allowance is not heritable.

Where an annuity to a daughter given under a will of her father is clearly in the nature of a maintenance allowance, the annuity is not heritable: 23 *All.* 194 (*P. C.*), *Foll.*

Simply follows 24 *All.* 194 (*P. C.*). *See also* 27 *O. C.* 350; *A. I. R.* 1925 *Oudh* 125; *A. I. R.* 1924 *Pat.* 721; *A. I. R.* 1923 *Pat.* 165 *as cases of similar nature.*

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 127 (4)

(*Lahore*)

CAMPBELL, J.

Rawal Bakhsh—Defendant—Appellant.

v.

Dolu Mal—Plaintiff—Respondent.

Second Appeal No. 2854 of 1925, Decided on 23rd February 1926, from a decree of the Dist. J., Multan, D/- 13th August 1925.

Evidence Act, S. 110—Suit for possession based on dispossession by defendant—Plaintiff must prove his possession within 12 years—Mere proof of anterior title is not enough—Limitation Act, Art. 142.

In a suit for possession based upon plaintiff's dispossession by the defendant, the burden of proof is on the plaintiff to prove his possession at some time within 12 years preceding the suit, and it is not enough to show merely an anterior title, without proof of possession within 12 years to shift the burden of proof on to the defendants to show that they were entitled to retain possession: 16 *Cal.* 473 (*P. C.*), *Foll.*; 41 *All.* 669; 39 *Mad.* 617; and *A. I. R.* 1922 *P. C.* 181, *Dist.*

Follows 16 *Cal.* 473 (*P.C.*).

See also Law Reporting Rules: *A. I. R* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69 73 and 81.

A. I. R. 1926 Journal 128 (1)

(*Oudh*)

NEAVE, A. J. C.

Chhotey Lal—Plaintiff—Appellant.

v.

Ram Bali and *others*—Defendants—Opposite Party.

Application No. 151 of 1925, Decided on 7th October 1925, against the decree of the Small Cause Court Judge, Bara Banki, D/- 4th December 1924.

Hindu Law—Debt incurred by widow but not for necessity cannot bind her husband's estate.

A debt incurred by a Hindu widow but not for legal necessity cannot bind the estate of the husband in the hands of the reversioners: 19 *All.* 300, *Foll.*

Simple point: 8 *M. I. A.* 500; 44 *C.* 186; 42 *M.* 523 (*P. C.*); 43 *C.* 417 (*P. C.*); 36 *A.* 187 (*P. C.*); *A. I. R.* 1924 *A.* 929; 42 *A.* 109; *A. I. R.* 1922 *B.* 51.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 128 (2)

(*Lahore*)

ZAFAR ALI, J.

Malkh Raj—Defendant—Appellant.

v.

Amin Chand and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 2921 of 1925, Decided on 18th March 1926, from the decree of the Dist. J., Gurdaspur, D/- 8th June 1925.

Transfer of Property Act, S. 60—Mortgagor agreeing to pay interest on additional sum raised on the same security—Interest as well as principal is a charge on the property.

When a mortgagor agrees to pay interest on an additional sum of money raised on the security of the property already mortgaged, the general rule that "a mortgagee is entitled to treat interest due under a mortgage as a charge upon the mortgaged property in the absence of any contract to the contrary" applies and the presumption is that the principal as well as interest is a charge on that prop rty, and is payable upon redemption: *A. I. R.* 1924 *P. C.* 183, *Foll.*

Simply follows A. I. R. 1924 *P. C.* 183.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 128 (3)

(*Lahore*)

HARRISON, J.

Dukh Bhajan Ram—Decree-holder—Appellant.

v.

Sarfraz Khan—Judgment-debtor—Respondent.

Miscellaneous Second Appeal No. 2894 of 1925, Decided on 20th March 1926, from the order of the Dist. J., Mianwali, D/- 16th June 1925.

Civil P. C., O. 21, Rr. 40 and 37—Executing Court cannot refuse order of arrest—Nor can it decline to issue warrants—Judgment-debtor should be informed of his right to present insolvency petition.

An executing Court cannot decline to issue warrants on the ground that the decree-holder can take a farm of the judgment-debtors' land or realize half the salary of the judgment-debtor, nor can it refuse to order arrest of judgment-debtors without a finding under O. 21, R. 40.

Before issuing warrants it is proper to inform the judgment-debtors that they can avoid arrest by presenting a petition in insolvency: *A. I. R.* 1926 *Lah.* 110.

Simply follows A. I. R. 1926 *Lah.* 110.

See also Law Reporting Rules: *A. I. R.* 1926, *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 128 (4)

(*Lahore*)

CAMPBELL, J.

Muhammad Zakria—Plaintiff—Appellant.

v.

Ghulam Ali—Defendant—Respondent.

Second Appeal No. 3034 of 1925, Decided on 28th April 1926, from a decree of the Dist. J., Mianwali, D/- 3rd August 1925.

(*a*) *Practice—Evidence.*

Court's mind should not be influenced by irrelevant and inadmissible evidence.

(*b*) *Evidence.*

Contents of record in a previous case are not admissible unless admitted or proved.

Simple point.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 129 (1)

(*Oudh*)

WAZIR HASAN, J.

Deputy Commissioner, Hardoi—Plaintiff—Appellant.

v.

Sital Sah—Defendant No. 2—Respondent.

Second Appeals Nos. 161 and 162 of 1925, Decided on 24th March 1926, from the decree of the 3rd Addl. Dist. J., Lucknow, at Hardoi, D/- 23rd December 1924.

(*a*) *Landlord and tenant—Transfer by tenant of his abad site is invalid unless there is custom validating it.*

The landlord is entitled to eject a transferee from a tenant of the abadi land unless it is shown by the transferee that his transferrer had the right to make the transfer: *A. I. R.* 1925 *Oudh* 262, *Foll.*

(*b*) *Custom—Proof—Transfer of abadi site by tenant—A few recent instances will not prove the custom.*

A few instances of recent dates cannot establish any valid custom of legalizing the transfer of abadi site by tenant.

(*a*) *Simply follows A. I. R.* 1925 *Oudh* 262.

(*b*) *Simple point.*

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 129 (2)

(*Lahore*)

CAMPBELL, J.

Karam Din and *another*—Plaintiffs—Appellants.

v.

Mehr Din and *others*—Defendants—Respondents.

Second Appeal No. 2974 of 1925, Decided on 16th February 1926, from the decree of the Addl. Dist. J., Lahore, D/- 22nd July 1925.

Muhammadan Law—Heirs—Adverse possession.

Where two of the heirs are in possession of more than their share and their mortgaging the shares as their own is recognized by the other heir, the heirs in possession of excess shares are to be deemed in adverse possession.

Simply on facts.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 129 (3)

(*Allahabad*)

SULAIMAN AND MUKERJI, JJ.

Mumtaz Ali—Plaintiff—Appellant.

v.

Allah Banda—Defendant--Respondent.

First Appeal No. 31 of 1925, Decided on 19th November 1925, from an order of the Addl. Sub-J., Meerut, D/- 3rd December 1924.

Civil P. C., S. 100—*Award—Court ordering decree in terms of the award—Order is appealable but no second appeal lies.*

Where instead of passing first an order directing the award to be filed and then passing a decree in terms of it, the Court passed a composite order decreeing the plaintiff's claim in terms of it.

Held: that even if the order of the Court were taken to be an order recording a compromise, an appeal lies from that order and that such appeal must be treated as an appeal from an order, with the result that no second apeaal lies: *A. I. R.* 1925 *All.* 404, *Foll.*

Simply follows A. I. R. 1925 *All.* 404.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 129 (4)

(*Lahore*)

MARTINEAU, J.

Ladha and *others*—Plaintiffs—Appellants.

v.

Mt. Karam Devi and *others*—Defendants—Respondents.

Second Appeal No. 3028 of 1925, Decided on 7th April 1926, from the decree of the Dist. J., Sialkot, D/- 19th August 1925.

Civil P. C., S. 100—*New plea should not be allowed for the first time in second appeal.*

A point which is not taken in the trial Court or in the grounds of appeal in the lower appellate Court, should not be allowed to be raised for the first time in second appeal.

Common point. See *A. I. R.* 1925 *P. C.* 118; *A. I. R.* 1922 *A.* 346; 19 *A. L. J.* 97 (*P. C.*); *A. I. R.* 1923 *A.* 358; *A. I. R.* 1925 *Lah.* 571; 20 *L. W.* 564.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 130(1)

(Oudh)

WAZIR HASAN AND RAZA, JJ.

Bansidhar and *others*—Plaintiffs—Appellants.

v.

Mata Din and *others*—Defendants—Respondents.

First Appeal No. 21 of 1925, Decided on 9th September 1926, against the decree of the Addl. Sub-J., Sitapur, D/- 13th November 1924.

(*a*) *Benami—Onus is heavily on him who propounds benami nature of the transaction.*

The burden of establishing that an ostensible owner in whose name the deeds stand is a benamidar for another is upon the party who alleges it. The burden is no doubt a difficult one to discharge, because in all these benami transactions the very object of the parties is secrecy; but still the person who alleges that property conveyed to another belongs to him must prove his allegation and prove it beyond reasonable doubt: *A. I. R.* 1926 *P. C.* 77, *Foll.*

(*b*) *Hindu Law—Partition—Unequivocal intention to separate is enough—Partition by metes and bounds is not necessary.*

Partition is a severance of joint status and as such it is a matter of individual volition. All that is necessary to constitute a partition is a definite and unequivocal indication of his intention by a member of a joint family to separate himself from the family and enjoy his share in severalty. Once a member of a joint family has clearly and unequivocally intimated to his co-sharers his desire to sever himself from the joint family, his right to obtain and possess his share is unimpeachable, whether or not the co-sharers agree to a separation and there is an immediate severance of the joint status. It is a mistake to suppose that there can be no partition until there is a division of the joint family property by metes and bounds: 11 *M. I. A.* 75, *Foll.*

(*a*) *Follows A. I. R* 1926 *P. C.* 77.

(*b*) *Follows* 11 *M. I. A.* 75 (*P.C.*).

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 130 (2)

(Lahore)

CAMPBELL, J.

Ram Singh and *others*—Defendants—Appellants.

v.

Ali Bakhsh and *others*—Plaintiffs—Respondents.

Second Appeal No. 3043 of 1925, Decided on 26th April 1926, from a decree of the Addl. Dist. J., Hoshiarpur, D/- 24th August 1925.

Easement—Right to bury dead can be acquired by prescription.

Exclusive and continuous user by the public of a land as a graveyard with the owner's knowledge and acquiescence for the prescriptive period will raise a presumption of a dedication to the public. By the custom of the country the ground in which human remains are interred is regarded for ever as sacred, and though the ownership of the soil may be vested in others, the permission to bury in the land carries with it the right to perform all customary rites: 78 *P. L. R.* 1908; 40 *Cal.* 297 (*P. C.*) and 26 *Bom.* 198, *Foll.*

Simply follows 40 *Cal.* 297.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 130(3)

(Allahabad)

DANIELS, J.

Babu Ram—Petitioner.

v.

Lakhan Singh—Opposite Party.

Civil Revision No. 180 of 1925, Decided on 3rd February 1926, from an order of the Small Cause Court J., Bareilly, D/- 10th August 1926.

Stamp Act, S. 36—Unstamped document once admitted cannot be rejected.

A Court acts illegally in rejecting as unstamped a document admitted by its predecessor.

Covered by section.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 130 (4)

Oudh)

STUART, C. J., AND RAZA, J.

Radhey Shyam and *another*—Appellants.

v.

Radhey Lal—Opposite Party.

Misc. Appeal No. 24 of 1926, Decided on 20th August 1926, from the order of the Dist. J., Lucknow, D/- 23rd February 1926.

Will—Construction—Bequest for dharm is void for uncertainty.

The word kar-e-khair means literally a good deed, but it also bears the coloquial meaning of a charitable act. A deviseor bequest for kar-e-

khair is void for vagueness and uncertainty ; 23 *Bom.* 725 (*P. C.*), *Foll.*

Follows 23 *Bom.* 725 (*P. C.*).

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 131 (1)

(*Lahore*)

JAI LAL, J.

Bhag—Plaintiff—Appellant.

v.

Ujagar Singh and *others*—Defendants—Respondents.

Second Appeal No. 11 of 1926, Decided on 26th April 1926, from the decree of the Dist. J., Jullundur, D/- 30th October 1925.

Transfer of Property Act, S. 52—Declaratory suit filed to impeach sale, during pendency of suit to pre-empt the sale, leaves the pre-emptor's rights unaffected.

During the pendency of a pre-emption suit, a declaratory suit was filed by the vendor's son to have the sale declared invalid as against his reversionary interest. The pre-emption suit was decreed first and then the declaratory suit was decreed. Vendor's son did not implead the pre-emptors as parties to his suit. He, therefore, filed a suit for possession after his father's death.

Held : that S. 52 applied and the plaintiff was not entitled to possession : 7 *P. R.* 1906 ; 3 *Lah.* 264, and *A. I. R.* 1922 *Lah.* 403 (2), *Foll.*

Simply follows 7 *P. R.* 1906 and *A. I. R.* 1922 *Lah.* 403 (2).

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 131 (2)

(*Calcutta*)

C. C. GHOSE, J.

Baijnath Kamani—Applicant.

v.

Secretary of State—Opposite Party.

Civil Revision from the decree of the Calcutta Small Cause Court J., in Suit No. 6984 of 1925, Decided on 25th June 1926.

Presidency Small Cause Courts Act, S. 18—Cause of action arising beyond jurisdiction—Defendant Secretary of State—Small Cause Court cannot try suit.

A suit against the Secretary of State for India in Council can only be brought in the Court within the local limits of whose jurisdiction the cause of action arises. The Secretary of State cannot be said to carry on business in Calcutta merely because the Head Office of the Eastern Bengal Railway against whom the plaintiff claims, is situate at Kaila Ghat Street within the jurisdiction of the Small Cause Court. Where the cause of action had arisen wholly outside the territorial jurisdiction of the Small Cause Court and no leave had been taken under S. 18.

Held : that the absence of leave is not a mere error of law, and the decision is without jurisdiction ; 40 *Cal.* 308 and 14 *Cal.* 256, *Foll.*

Simply follows 40 *Cal.* 308 and 14 *Cal.* 256.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 52, 61, 69, 73 and 81.

A.I.R. 1926 Journal 131 (3)

(*Lahore*)

HARRISON, J.

Badri Das—Plaintiff—Petitioner.

v.

Ghulam Muhammad—Defendant—Respondent.

Civil Revision No 11 of 1926, Decided on 17th March 1926. from a decree of the Small Cause Court J., Jullundur, D/- 20th October 1925.

Civil P. C., O. 20, R. 4—Judgment of the Small Cause Court.

A judgment of the Small Cause Court must state the points for determination and the decision thereon.

Covered by the Section.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 23, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 131 (4)

(*Lahore*)

JAI LAL, J.

Beant Singh—Plaintiff—Petitioner.

v.

Jaimal Singh— Defendant—Opposite Party.

Civil Revision No. 89 of 1926, Decided on 11th May 1926, from a decree of the Small Cause Court J., Amritsar, D/- 27th October 1925.

Practice—Adjournment of a few hours should be granted.

Where on the date of hearing of a Small Cause case, the plaintiff was not ready with his

evidence, but requested only two hours time to produce evidence.

Held : that the Court should grant the time as requested.

Simple point.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 132 (1)

(*Lahore*)

HARRISON AND DALIP SINGH, JJ.

Abdullah—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 24 of 1926, Decided on 1st May 1926, from an order of the Addl. S. J., Multan, at Dera Ghazi Khan, D/- 4th December 1925.

Evidence—Criminal trial.

Though each of the facts is inconclusive, their cumulative value may establish the guilt and exclude other possibilities.

Simple point.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 132 (2)

(*Lahore*)

BROADWAY, J.

Dip Chand and *others*— Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revision No. 33 of 1926, Decided on 19th February 1926, from the order of the S. J., Karnal, D/- 21st November 1925.

Penal Code, S. 63—Capacity to pay fine must be considered.

A fine should not be imposed on an accused person which it is wholly impossible for him to pay without ruining himself and inflicting great hardship on his family : *A. I. R.* 1924 *Lah.* 81, *Foll.*

Simply follows A. I. R. 1924 *Lah.* 81.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 132 (3)

(*Lahore*)

BROADWAY, J.

Emperor—Petitioner.

v.

Hoshiara—Accused—Respondent.

Criminal Revision No. 93 of 1926, Decided on 26th March 1926, reported by the S. J., Karnal.

Criminal P. C., S. 562—Even though order under S. 562 is illegal, High Court is not bound to interfere under S. 439.

High Court, as a Court of revision, is not bound to interfere with an order under S. 562, even when the order is illegal : 19 *P. W. R.* 1910 and 5 *P. R.* 1906 *Cr., Foll.*

Simply follows 5 *P. R.* 1906 *Cr.*

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 132 (4)

(*Oudh*)

STUART, C. J., AND GOKARAN NATH MISRA, J.

King-Emperor— Complainant—Appellant.

v.

Jagannath—Accused—Respondent.

Criminal Appeal No. 97 of 1926, Decided on 16th April 1926, from the order of the Addl. S. J., Unao, D/- 30th January 1926.

Criminal P. C., S. 339-A—Tender of pardon—Approver complying with conditions of pardon and making statement—When cross-examined making damaging admissions, but not resiling from previous statement—Conditions of pardon are complied with.

Where in examination-in-chief an approver clearly complied with the terms of the pardon adhering to the statement which he made in his confession, and when cross-examined made certain damaging admissions, but did not actually resile from his previous statement, and in re-examination he returned once more towards his previous statement.

Held : that he did comply with the conditions of the pardon.

Simply on facts.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 133 (1)

(*Allahabad*)

DANIELS, J.

Mt. Bhagwati Devi—Defendant—Applicant.

v.

Shanker Lal and *others*—Plaintiffs—Opposite Party.

Civil Revision No. 32 of 1926, Decided on 5th May 1926, from an order of the Dist. J., Bulandshahr, D/- 11th December 1925.

Civil P. C., S. 151 *and O.* 41, *R.* 11—*Amendment of decree—Appeal from decree dismissed—Decree can be amended by appellate Court.*

Where a decree is appealed from and the appeal is dismissed under O. 41, R. 11, the decree can be amended only by the appellate Court : 11 *All.* 267 (*F. B.*) and 30 *All.* 290, *Foll.*

Simply follows 11 *All.* 267 (*F. B.*) and 30 *All.* 290.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 133 (2)

(*Madras*)

KRISHNAN, J.

Arunachala Naicker—Petitioner.

v.

C. K. Venkatachari and *another*—Respondents.

Civil Revision No. 872 of 1925, Decided on 9th December 1925, from the order of the Dist. Munsif, Madurantakam, at Chingleput, in M. P. No. 454 of 1925.

Madras Local Boards Act (1920)—*Rules under R.* 4, *Cl.* (3)—*Election petition filed in Subordinate Judge's Court—He cannot transfer it to a District Munsif.*

An election petition was filed in the Court of the Subordinate Judge of Chingleput. The Subordinate Judge acting under R. 4, Cl. 3 of the rules framed under the Madras Local Boards Act, transmitted the case to the Court of the District Munsif of Madurantakam. The District Munsifs are not treated as subordinate to the Subordinate Judges.

Held : that the Court of the District Munsif, not being subordinate to the Subordinate Judge's Court, is not a Court to which the Subordinate Judge was entitled to send this petition.

On facts.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 133 (3)

(*Allahabad*)

DANIELS, J.

Mathura Prasad—Defendant—Applicant.

v.

Kodari—Plaintiff—Opposite Party.

Civil Revision No. 15 of 1926, Decided on 8th April 1926, from an order of the Sub-J., Bareilly, D/- 12th September 1925.

Civil P. C., O. 23, *R.* 1—*Revision—Order allowing withdrawal passed without jurisdiction—Appeal lies.*

Where the Court allowing the plaintiff to withdraw his suit with liberty to bring a fresh one has not exercised a judicial discretion in the matter, his order can be revised ; *See* 9 *A. L. J.* 353=14 *I. C.* 97.

Common point. See *A. I. R.* 1925 *All.* 466 : 1922 *All.* 185 ; 1924 *Cal.* 751 ; 1922 *Nag.* 84, and 1925 *Oudh.* 596.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 133 (4)

(*Lahore*)

BROADWAY, J.

Moti Singh—Plaintiff—Appellant.

v.

Roda and *another*—Defendants—Respondents.

Second Appeal No. 2030 of 1925, Decided on 11th January 1926, against a decree of the Addl. Dist. J., Hoshiarpur, D/- 2nd April 1925.

Limitation Act, Art. 120—*Suit for declaration and correction of revenue entries—Limitation starts from date when defendant challenges title where he paid no revenue or received rent.*

Where the defendant, in whose name the entries in question stand, has neither paid any revenue nor received any rent, limitation for declaration of plaintiff's title and correction of revenue entries starts from date of the overt act threatening plaintiff's rights : *A. I. R.* 1922 *Lah.* 94, *Foll.* and 79 *P. R.* 1917, *Dist.*

Simply follows A. I. R. 1922 *Lah.* 94.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 134 (1)

(*Oudh*)

STUART, C. J.

Ganpat Sahai—Accused— Applicant.

v.

Koshalendra Pratab Sahi—Complainant—Opposite Party.

Misc. Application No. 719 of 1925, Decided on 3rd December 1925, for transfer of a pending criminal case.

Criminal P. C., S. 526—Acts indicating interest are grounds for transfer.

Where a seat on the dais was given to a gentleman, not necessarily having any connexion with the case while the Magistrate was hearing it; where he received visits from the complainant and the accused during the conduct of the proceedings thereby laying himself open to an imputation, and where the Magistrate accepted a lift in the complainant's car and sat in it with the complainant's brother.

Held: it was advisable to transfer the hearing of the case.

On facts.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 134 (2)

(*Allahabad*)

DANIELS, J.

Faruq Husain—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revision No. 125 of 1926, Decided on 26th April 1926, from the order of the S. J., Farrukhabad.

Penal Code, S. 379—Accused purchasing trees at auction held by President of the Municipality to whom they belonged — Accused removing the trees before confirmation of sale by the Board—Accused is not guilty.

Where in pursuance of a resolution by a Municipal Committee the President of the Committee sold certain trees belonging to the Municipality by auction and the accused purchased them, but before the sale was confirmed the accused removed the trees,

Held: that the accused was not guilty of theft.

Covered by the section.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 134 (3)

(*Lahore*)

SHADI LAL, C. J. AND COLDSTREAM, J.

Mirza and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 329 of 1926, Decided on 12th June 1926, from an order of the S. J., Rawalpindi, D/- 16th March 1926.

(*a*) *Penal Code, S. 302—Circumstantial evidence—To base conviction on circumstantial evidence, facts proved must be incompatible with accused's innocence.*

The fundamental rule by which the effect of circumstantial evidence is to be estimated is well established. In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt; *A. I. R.* 1926 *Lah.* 88, *Foll.*

(*b*) *Penal Code, S. 302—Accused pointing out place whence deceased's property was recovered is not sufficient for conviction.*

The mere recovery of property belonging to the deceased from a place pointed out by a person accused of the murder cannot be regarded as a proof that the accused was a murderer; *A. I. R.* 1924 *Lah.* 109, *Foll.*

Simply follows (*a*) *A. I. R.* 1926 *Lah.* 88 *and* (*b*) *A. I. R.* 1924 *Lah.* 109.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 134 (4)

(*Allahabad*)

DANIELS, J.

Ram Surat and *another* — Accused—Applicants.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 104 of 1926, Decided on 8th March 1926.

Criminal trial—Evidence — Conviction should not be based on mere conjectures.

Where the Sessions Judge did not believe nine-tenths of the prosecution evidence but convicted the accused on his own theories of the occurrence for which there was nothing on record to support it,

Held: that the conviction should be set aside.

Simple point.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 136 (1)

(*Patna*)

BUCKNILL, J.

Mukhlal Rai—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 343 of 1926, Decided on 4th June 1926, from an order of the S. J., Shahahabad, D/- 10th May 1926.

Penal Code, S. 406 — Money advanced in respect of a contract—Breach of contract — Suit for recovery lies in civil Court.

Where money is advanced in respect of a contract, and there is no entrustment in a fiduciary form, any dispute arising out of the breach of contract is one of civil nature and capable of settlement not in the criminal but in the civil Courts.

Simple point.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 136 (2)

(*Oudh*)

GOKARAN NATH MISRA, J.

Mohan and *others*—Petitioners.

v.

Parmai—Opposite Party.

Misc. Application No. 387 of 1926, Decided on 3rd August 1926, for leave to appeal against the judgment and decree of Gokaran Nath Misra, J., reported in *A. I. R.* 1926 *Oudh* 412.

(*a*) *Co-sharer—Suit by one for demolition of structures built by another on common land—Decree should be passed if inconvenience cannot be remedied at partition.*

Where the plaintiff sued some of his co-sharers for possession of a piece of shamilat land and for demolition of a chaupal erected thereon by them, and where it was found that by that construction the village road had been blocked to some extent and the inconvenience could not be remedied at the time of partition, the plaintiff was entitled to the relief claimed ; 7 *O. C.* 362, *Foll.*

(*b*) *Oudh Courts Act* (1925), *S.* 12 (2)—*Principles of granting leave explained.*

The test to be applied in granting leave to appeal should be whether the question involved is one of public importance or of some such importance that the grievance complained of caused by the decree passed in appeal is not measurable in money ; *A. I. R.* 1926 *Oudh* 415, *Foll.*

(*a*) *Follows* 7 *O. C.* 362.

(*b*) *Follows A. I. R.* 1926 *Oudh* 415.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 136 (3)

(*Lahore*)

FFORDE, J.

Abdullah and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 357 of 1926, Decided on 4th June 1926, from an order of the 1st Cl. Mag., Gujranwala, D/- 19th March 1926.

Penal Code, S. 34—Section does not apply in the construction of S. 397, Penal Code.

All the High Courts in India have now taken the same view as to the applicability of S. 34 in dealing with punishment which may be awarded under S. 397, Penal Code. It is now finally established that S. 34 has no application in the construction of S. 397.

Ibid A. I. R. 1924 *Cal.* 643 and *covered by the section S.* 397.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 136 (4)

(*Allahabad*)

DANIELS, J.

Amer Singh—Plaintiff—Appellant.

v.

Ram Saroop and *others*—Defendants—Respondents.

Second Appeal No. 14 of 1924, Decided on 7th May, 1926, from a decree of the Addl. Sub-J., Mainpuri, D/- 6th October 1923.

Civil P. C., O. 1, R. 3—Mortgage suit—Joint family consisting of father and son—Father not traceable—Son becomes managing member—It is sufficient if he is impleaded.

Where a joint family consisted of father and his son, and the father has disappeared and cannot be traced, the son is obviously the managing member; and in mortgage suits it is sufficient if the managing member or members are impleaded : 36 *All.* 383 (*P. C.*) ; 34 *All.* 549 (*F.B.*) ; and 6 *P. L. J.* 640, *Foll.*

Simply follows 36 *All.* 383 (*P.C.*) and 34 *All.* 549 (*F. B.*).

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 137 (1)

(Allahabad)

DANIELS, J.

Rinnu—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revision No. 166 of 1926, Decided on 23rd March 1926, from an order of the S. J., Muttra, D/- 24th November 1925.

Criminal P. C., S. 342—Omission to comply fully with, does not vitiate trial.

An omission to comply fully with the provisions of S. 342 does not vitiate the trial unless the accused has been prejudiced : *A. I. R.* 1923 *All.* 81; *A. I. R.* 1925 *Pat.* 414 and *A. I. R.* 1925 *Rang.* 258 *Foll.*

Simply follows A. I. R. 1923 *All.* 81.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 137 (2)

(Lahore)

BROADWAY AND ZAFAR ALI, JJ.

Jang Singh—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 268 of 1926, Decided on 26th May 1926, from an order of the S. J., Hissar, D/- 8th February 1926.

Evidence Act, S. 133—Conviction on uncorroborated testimony of approver is unsafe.

When there is no corroborative evidence of the approver's testimony, it is unsafe to base a conviction on that evidence.

See 6 *L. B. R.* 4; 18 *C. W. N.* 550; 38 *C.* 559; 12 *O. C.* 418 *A. I. R.* 1924 *C.* 701; *A. I. R.* 1925 *L.* 268; 1925 *L.* 44.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 137 (3)

(Lahore)

MARTINEAU, J.

Emperor—Petitioner.

v.

Chhotu—Accused—Respondent.

Criminal Revision No. 318 of 1926, Decided on 23rd April 1926, reported by the S. J., Delhi.

Penal Code, S. 411—Stolen article found by Police in a house occupied by accused and his mother—No evidence as to accused knowing of it—He cannot be convicted.

An ornament called a kangni, stolen in a burglary, was found by the Police in a jar of chillies in a house occupied by the accused and his mother. There was nothing to show that the accused put the kangni in the jar or knew that it was there.

Held : that he cannot be convicted under Penal Code, S. 411.

On facts as Penal Code, S. 411 covers the case.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 137 (4)

(Oudh)

GOKARAN NATH, J.

Seetla Din—Plaintiff—Appellant.

v.

Debi Dayal and *others*—Defendants—Respondents.

Second Appeal No. 242 of 1925, Decided on 17th March 1926, from a decree of the Sub-J., Partabgarh, D/- 15th December 1924.

Civil P. C., O. 41, R. 1—Failure to file a copy of judgment and decree appealed against is fatal to the appeal.

Where two different appeals were heard together by the first appellate Court and it decided both of them by one judgment, the principal judgment being written in No. 31, and in the Appeal No. 45 a reference was made to the judgment in the other appeal, and where the appellant could, if he had liked, have filed two appeals : one against the judgment and decree in Appeal No. 45 and the other against the judgment and decree in Appeal No. 31, but chose to file only one appeal and that too against the judgment and decree in Appeal No. 45, but instead of filing the copies of judgment and decree in that appeal he filed copies of Appeal No. 31.

Held : that in order to present a valid appeal it is necessary that an appellant must file a copy of the judgment and decree against which he appeals and that therefore in the absence of filing a copy of the judgment and decree in Appeal No. 45, the appeal is invalid:

Common point. See R. 1 *of O.* 41 and also 3 *Lah.* 215=*A. I. R.* 1922 *L.* 390; 1922 *Lah.* 191 ; 1923 *Mad.* 482; 16 *All.* 77 1925 *N.* 52.

H. N. Dass—for Respondent.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

L. N. Das
Advocate High Court
Jammu & Kashmir

A. I. R. 1926 Journal 138 (1)
(*Madras*)
JACKSON, J.

Krishnan Chetty—Petitioner—Appellant.

v.

Avudayammal—Respondent.

Appeal No. 3 of 1925, Decided on 27th July 1926, from the Appellate Order of the Sub-J., Ramnad at Madura, in A. S. No. 152 of 1924.

Civil P. C., S. 47—Question as to applicant's status as legal representative of decree-holder decided—Appeal lies.

An appeal lies against an order determining whether a party applying for execution is or is not the representative of the decree holder: 25 *Mad.* 545, *Foll.*

Simply follows 25 *Mad.* 545.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 138 (2)
(*Patna*)
BUCKNILL, J.

(*Malik*) *Mukhtar Ahmad*—Plaintiff—Petitioner.

v.

Wasi Ahmed Khan and *others*—Defendants—Opposite Party.

Civil Revision No. 129 of 1925, Decided on 23rd June 1925, against an order of the Munsif, Gaya, 3rd Court, D/- 21st March 1925.

Bengal Tenancy Act, S. 153-A—Court may not necessarily insist on depositing the amount admitted by defendant before setting aside ex-parte decree.

Although under S. 153-A the Court may ask the applicant applying to set aside the ex-parte decree to deposit in Court the amount admitted by defendant to be due to plaintiff, it may allow such application without deposit where the decree is passed by mistake for which the defendants are not seriously to be blamed.

Simply on facts.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 138 (3)
(*Oudh*)
SIMPSON, A. J. C.

Lachmi Kuer and *others*—Applicants.

v.

Partab Narain—Opposite Party.

Criminal Application No. 138 of 1925, Decided on 15th September 1925, against an order of the S. J., Fyzabad, D/- 6th July 1925.

Criminal P. C., S. 145—Magistrate cannot compel a party, who has a decree in his favour, to go to civil Court again.

Once a decree for possession in respect of a land has been passed in favour of a person, the Magistrate cannot again refer him to civil Court to have his title cleared. He is only to give effect to the decree of the civil Court.

Simple point.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 138 (4)
(*Lahore*)
SHADI LAL, C. J., AND JAI LAL, J.

Dhani—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 318 of 1926, Decided on 8th July 1926, from the order of the S. J., Karnal, D/- 26th February 1926.

Penal Code, Ss. 114 and 302—Woman sitting close by and urging assailants to kill their victim is guilty of abetment.

Where a woman was at time of murder sitting on a charpoy at a distance of about eight yards, and was urging the assailants to kill their victim.

Held: her act amounted to an abetment of the offence of murder, and she can be convicted under S. 302 read with S. 114.

On facts.

See also Law Reporting Rules: *A. I. R*, 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 138 (5)
(*Calcutta*)
B. B. GHOSE AND GRAHAM, J.

Official Trustee of Bengal—Plaintiff—Appellant.

v.

Akshoy Kar and *others*—Defendants—Respondents.

Appeals Nos. 2631 to 2637 of 1923, Decided on 23rd March 1926, from the Appellate decrees of the Dist. J., Midnapore, D/- 28th June 1923.

Bengal Tenancy Act, S. 102 (h)—Settlement Officer is bound to record grounds of remission of rent.

The Settlement Officer is bound to record the conditions on which remission of rent may be

claimed by tenant under S. 102 (h) : *A. I. R.* 1925 *Cal.* 564, *Foll.*

Simply follows A. I. R. 1925 *Cal.* 564.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 139 (1)

(*Lahore*)

ZAFAR ALI, J.

Bishan Singh—Convict—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 277 of 1926, Decided on 8th May 1926 from the order of the S. J., Amritsar, D/- 19th January 1926.

Criminal trial—Benefit of doubt.

A person was charged under Arms Act and also Opium Act. He was ultimately acquitted under latter on the ground that the opium found in his house may have been brought there by his servant, who was a badmash.

Held : that his conviction under the Arms Act should also be set aside for the same reason.

On facts.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 139 (2)

(*Oudh*)

STUART, C. J., AND HASAN, J.

Dhiraj Kunwar—Plaintiff—Appellant.

v.

Chandrika Prasad and *others*—Defendants—Respondents.

First Appeal No. 30 of 1924, Decided on 23rd November 1925, against the decree of the Sub-J., Fyzabad, D/- 30th April 1924.

Pardanashin lady—It is sufficient proof of compromise by a lady that general result of compromise is understood by her.

In order to prove that a compromise executed by her is binding upon a pardanashin lady it is sufficient that the general result of the compromise should be understood, and that people disinterested and competent to give advice should, with a fair understanding of the whole matter, advise the lady that the deed should be executed : 47 *Cal.* 175 (*P. C.*), *Foll.*

Follows 47 *Cal.* 175 (*P.C.*).

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 139 (3)

(*Oudh*)

STUART, C. J., AND HASAN, J.

Ram Narain and *others*—Defendants—Appellants.

v.

Kunwar Bahadur—Plaintiff—Respondent.

First Appeals Nos. 46 and 47 of 1924, Decided on 24th November 1925, from the decree of the Sub-J., Kheri, D/- 31st March 1924.

Hindu Law—Debts—Antecedent debts—Mortgage to pay off previous mortgages is binding on sons.

Where a mortgage is executed by a father to pay off certain previous mortgages of joint family property, is a mortgage to pay off antecedent debts and as such is binding on the sons : *A. I. R.* 1924 *P. C.* 50, *Foll.*

Simply follows A. I. R. 1924 *P. C.* 50.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 139 (4)

(*Lahore*)

BROADWAY, J.

Hakim Rai—Plaintiff—Petitioner.

v.

Rahim Bakhsh—Defendant—Respondent.

Civil Revision No. 174 of 1926, Decided on 3rd June 1926, from the order of the 3rd Class Sub-J., Gujranwala, D/- 2nd November 1925.

Civil P. C., O. 9, R. 9—Plaintiff present in Court, but going to ease himself—Case dismissed in the meantime—Restoration should be ordered.

Where the plaintiff attended the Court, but he found it necessary, indeed imperative, to go to a well in order to ease himself, and on his return he found that the case had been dismissed in default.

Held : that the case should have been restored.

On facts.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 140 (1)

(Oudh)

STUART, C. J., AND GOKARAN NATH MISRA, J.

Mt. Wahibunnisa— Plaintiff—Appellant.

v.

Mushaf Husain and *others*—Defendants—Respondents.

First Appeal No. 60 of 1924, Decided on 23rd March 1926, from the decree of Sub-J., Rae Bareli, D/- 30th May 1924.

(*a*) *Deed—Construction—Deed should be construed as a whole.*

In a deed of settlement executed by the father to settle his property upon his male issue and also to provide for the maintenance of himself, his wife, his daughter and his mother, in short to make such arrangements for the members of his family and for those whom he was morally bound to support, as might prevent future disputes, it would be unsafe to interpret its provisions piecemeal and to rely upon them for the purpose of determining the rights conferred on a particular individual mentioned therein. In order to put a correct interpretation on a deed it must be looked to as a whole. It would be unsafe to ignore certain express provisions in the deed and merely to rely upon the rest : 9 *M. I. A.* 123 and 9 *Cal.* 952 (*P. C.*), *Foll.*

(*b*) *Mahomedan Law— Gift — Creation of life estate under Shia Law is permissible.*

Under the Shia Law the creation of a life-estate and the gift of a deferred estate, which would amount to a vested remainder in English Law, is clearly permissible and such a power can be exercised by a Shia Mahomedan in respect of immovable property of any character whatsoever : 24 *O. C.* 321 and 32 *Bom.* 172, *Foll.*

(*a*) *Follows* 9 *M. I. A.* 123 (*P. C.*) and 9 *Cal.* 952 (*P. C.*).

(*b*) *Follows* 24 *O. C.* 321.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 140 (2)

(Lahore)

JAI LAL, J.

Firm Rattan Chand-Bhawani Das—Plaintiff—Petitioner.

v.

Firm Kewal Ram-Rup Chand and *others*—Defendants—Respondents.

Civil Revision Petition No. 144 of 1926, Decided on 10th June 1926, from an order of the Dist. J., Amritsar, D/- 1st February 1926.

Civil P. C., S. 151—Accidental mistake in party's name.

Section 151 empowers a Court to allow correction of an accidental mistake in the name of a party.

Simple point. See *Civil P. C., S.* 151.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 140 (3)

(Oudh)

STUART, C. J., AND RAZA, J.

Kedar Nath and *others*—Plaintiffs—Appellants.

v.

Shankar Dayal and *others*—Defendants—Respondents.

First Appeal No. 68 of 1924, Decided on 22nd February 1926, from the judgment of the Sub-J., Bara Banki, D/- 28th July 1924.

Hindu Law—Alienation by father—Mortgage ripening into decree—Sons must prove illegality.

Where a mortgage by father has merged into a decree, it is not sufficient for sons to prove that it was without necessity, but they must prove that it was for illegal or immoral purposes : *A. I. R.* 1926 *Oudh* 321, *Foll.*

Follows A. I. R. 1926 *Oudh* 321.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 140 (4)

(Lahore)

ZAFAR ALI, J.

Saifal—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 163 of 1926, Decided on 30th March 1926, from an order of the S. J., Shahpur, at Sargodha, D/- 19th January 1926.

Evidence Act, S. 27—Corpse—Discovery on information by accused—Statement of accused to police that he buried body is admissible.

Where a person was murdered and his body was discovered in consequence of information received from the accused, the statement of accused to the police that he in company with his father and brother buried the body is admissible in evidence : 25 *Cal.* 413 ; 98 *P. L. R.* 1918 and 72 *P. L. R.* 916, *Foll.*

Section 27 is clear.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 141 (1)

(Lahore)

BROADWAY AND ZAFAR ALI, JJ.

Muzaffar—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 141 of 1926, Decided on 13th May 1926, from the order of the S. J., Sargodha, D/- 21st January 1926.

(a) *Evidence Act, S. 32 (1)—Dying declaration.*

No reliance would be placed on the dying declaration when it is made at a time when the deceased must have been well aware of the fact that the accused has been named as his assailant.

(b) *Criminal trial—Evidence.*

Accused is entitled to the benefit of doubt.

(a) *Only on facts*; (b) *is simple point.*

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 141 (2)

(Calcutta)

WALMSLEY AND CHAKRAVARTI, JJ.

Brahmopada Bhattacharjee and *others* —Plaintiffs—Appellants.

v.

Rai Mohan Haldar and *others*—Defendants—Respondents.

Appeal No. 82 of 1924, Decided on 18th December 1925, from the original decree of the 2nd Addl. Dist. J., 24-Perganas, D/- 21st January 1924.

Deed—Construction—Will—Testator a layman —Words must not be strictly construed—Circumstances also should be looked at.

Where a Will is made by a layman, Court must not construe it with too great nicety, or assign too much weight to the exact words that are used for a transfer of property, as if the testator were accurately weighing the difference between a testamentary instrument and one operating inter vivos. In a cass like this not only the words actually used in the deed should be considered, but also the circumstances should be taken into consideration and the matter ought to be broadly looked at: 10 *Cal.* 792 and 32 *All.* 227, *Foll.*

Simply follows 10 *Cal.* 792.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 141 (3)

(Madras)

ODGERS AND MADHAVAN NAIR, JJ.

(Valavala) Lakshminarasamma — Claimant—Appellant.

v.

Assistant Commissioner of Labour—Referring Officer—Respondent.

Appeal No. 76 of 1924, Decided on 24th July 1925, from the decree of the Dist. J., Godavari, at Rajahmundry, in O. S. No. 178 of 1921.

Land Acquisition—Basis.

Land cannot be valued on the basis of building site and at the same time as a cocoanut tope: *A. I. R.* 1926 *Mad.* 945, *Foll.*

Simply follows A. I. R. 1926 *Mad.* 945.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 141 (4)

(Lahore)

MARTINEAU, J.

Sarup Singh—Accussd—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 130 of 1926 Decided on 23rd April 1926, from an order of the S. J., Karnal, D/- 12th November 1925.

Penal Code, S. 499, Excep. 8—Report to police that a lost article was in accused's house does not amount to defamation.

A buffalo of one S was lost. He reported the matter to the police and said he had been informed that the buffalo was in the house of one H. The police went to the village and searched H's house, but did not find the animal there. H prosecuted S for defamation in respect of the report made at the thana and S was convicted.

Held: that the conviction should be set aside as S cannot be said to have made an imputation concerning H, even if the report that he made was prima facie defamation. The case is covered by the 8th Exception to S. 499, Indian Penal Code.

The case exactly fits in with S. 499, Excep. 8.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 142 (1)

(Lahore)

JAI LAL, J.

Muhammad Ali— Plaintiff— Appellant.

v.

Jalal Din and *another*—Defendants—Respondents.

Misc. Second Appeal No. 404 of 1926, Decided on 14th May 1926, from an order of the Addl. Dist. J., Lahore, D/- 20th October 1925.

Civil P. C., O. 41, Rr. 23 and 25—Suit not decided on preliminary point—Remand cannot be ordered under R. 23.

Where the trial Court has not decided the suit on a preliminary point, remand cannot be ordered under R. 23, it can then be ordered under R. 25.

Order 41, Rule 23 is clear on the point.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 142 (2)

(Calcutta)

NEWBOULD AND GRAHAM, JJ.

Thakurdin Tewari—Plaintiff—Appellant.

v.

Mahammad Ibrahim and *others*—Defendants—Respondents.

Appeal No. 2643 of 1922, Decided on 12th June 1925, from the appellate decree of the Addl. Dist. J., Noakhali, D/- 26th May 1922.

Bengal Tenancy Act, S. 105—Application for additional rent for excess area, dismissed for non-prosecution—Subsequent suit for additional rent cannot be maintained but may be treated as a suit for rent at orginal rate.

Where the plaintiff has made an application under S. 105 claiming additional rent for excess area and that application is dismissed for non-prosecution, the claim for additional rent for excess area cannot be maintained in a subsequent suit: *A. I. R.* 1925 *Cal.* 845, *Foll.*, But where the claim for enhancement has been abandoned by the plaintiff the suit may be treated as a suit for rent at the original rate: 48 *Cal.* 157, *Foll.*

Simply follows 48 *Cal.* 157; *A. I. R.* 1925 *Cal.* 845.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 142 (3)

(Lahore)

CAMPBELL, J.

Gurmukh Singh — Accused — Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 445 of 1926, Decided on 14th May 1926, reported by the S. J., Hissar, on 11th March 1926.

Criminal P. C., S. 502—Surety applying for discharge—Bond cannot be forfeited without complying with S. 502 (2).

Where a surety applies for discharge, his security bond cannot be forfeited without complying with the provisions of S. 502, Cl. (2).

The case comes within the wording of the section.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 142 (4)

(Oudh)

RAZA, J.

Mahesh Brehman—Defendant—Appellant.

v.

Ram Sagar—Plaintiff—Respondent.

Second Appeal No. 419 of 1924, Decided on 18th February 1926, against the decision of the Addl. Sub. J., Gonda, D/- 17th September 1924, in Appeal No. 186 of 1924.

Transfer of Property Act, S. 52—Purchaser of subject-matter of litigation pendente lite is bound by the result even though he is not a party—Lis pendens applies to eeccution sale.

A person who purchases property forming the subject-matter of a litigation pendente lite will be bound by the result of that litigation though he was no party to it. The rule of lis pendens applies to purchasers at the execution sale in the same way as to other transferees and it is not open to such auction purchasers to question decree passed in a litigation which was pending in regard to the property on the date of their purchase, though they were not parties to the decree; 16 *O. C.* 148, *Foll.*

Follows 16 *O. C.* 148.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 143 (1)

(*Lahore*)

COLDSTREAM, J.

Jamal and *others*— Defendants — Appellants.

v.

Ajaib Singh and *another*—Plaintiffs —Respondents.

Second Appeal No. 454, of 1926, Decided on 20th May 1926, from a decree of the Addl. Dist. J., Ferozepore, D/- 4th November 1925.

Custom (Punjab)—Minor—Suit to contest an unnecessary alienation—Suit if in the interest of minor declaratory decree can be given.

A declaratory decree may be given in a suit to contest an unnecessary alienation if the suit is brought honestly on behalf of a minor reversioner to protect his interests, but it would not be proper to pass a decree in a case in which the minor is merely a figure head and the real plaintiff is alienor himself who has caused the suit to be instituted for the purpose of undoing his own act: *A. I. R.* 1925 *Lah.* 24 and *A. I. R.* 1925 *Lah.* 127, *Foll.*

Simply follows A. I. R. 1925 *Lah.* 24 and 127.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 143 (2)

(*Lahore*)

COLDSTREAM, J.

Barkat Ali and *another*—Judgment-debtors—Appellants.

v.

Guranditta and *another*—Creditors—Respondents.

Misc. First Appeal No. 467 of 1926, Decided on 17th May 1926, from the order of the Dist. J., Gurdaspur, D/- 8th February 1926.

Provincial Insolvency Act, S. 10—Petitioner owning occupancy land—He cannot be deemed to be unable to pay debt unless landlord has refused permission to alienate the same.

Unless it is shown that the landlords had refused to allow alienation of the occupancy rights, it cannot be said that the debtor possessing those occupancy rights is unable to pay his debts.

Simple point.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 143 (3)

(*Allahabad*)

DANIELS, J.

Saktu Mal—Plaintiff—Appellant.

v.

Har Prasad and *others*—Defendants—Respondents.

Second Appeal No. 474 of 1926, Decided on 1st June 1926, from a decree of the Addl. Sub-J., Etawah, D/- 9th December 1925.

(a) Partition Act, S. 4—"Undivided" does not refer to Hindu joint family.

"Undivided" does not refer to a joint Hindu family but includes every family, Hindu or other, which is undivided qua the particular dwelling house, and includes a house which belongs to the family and in which members of the family have a right to live: 30 *All.* 324 (*F. B.*), *Foll.*

(b) Partition Act, S. 4—Form of decree—Defendants to pay ascertained value of plaintiff's share plus costs of the suit within a certain period or suit to stand decreed—Decree is good decree.

Where the decree directed the defendants to pay the ascertained value of the plaintiff's share plus costs of the suit to him within two months, otherwise his suit for partition would be decreed, and he would be entitled to partition.

Held: that the decree was a good decree: 39 *All.* 672, *Foll.*

Simply follows (*a*) 30 *All.* 324 (*F. B.*) and (*b*) 39 *All.* 672.

See also Law Reporting Rules: *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 143 (4)

(*Lahore*)

CAMPBELL, J.

Thakar Das—Defendant—Petitioner.

v.

Firm Bhola Shah-Duni Chand—Plaintiff—Respondent.

Civil Revision Petition No. 107 of 1926, Decided on 27th April 1926, from the decree of the Sm. C. Ct. J., Amritsar, D/- 23rd January 1926.

Civil P. C., S. 115—Pleas of limitation and jurisdiction raised but not decided—Revision lies.

Where the lower Court fails to decide the pleas of jurisdiction and limitation raised by defendant in his written statement, revision lies.

Repeats section.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 144 (1)
(*Lahore*)
CAMPBELL, J.

Kaloo Mal and *another* — Accused — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revision No. 418 of 1926, Decided on 18th June 1926, from an order of the Dist. J., Amritsar, D/- 1st March 1926.

Criminal P. C., S. 439—No revision ordinarily lies against appellate order under S. 476-B.

Interference in revision with appellate orders refusing to withdraw complaint under S. 476-B is ordinarily not desirable: *A. I. R.* 1926 *Lah.* 305, *Foll.*

Merely follows A. I. R. 1926 *Lah.* 305.

See also Law Reporting Rules: *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 144 (2)
(*Lahore*)
DALIP SINGH, J.

Naubat Rai—Defendant — Petitioner.

v.

Sanskrit Patshala of Jullundur City —Plaintiff—Respondent.

Civil Revision No. 474 of 1926, Decided on 8th June 1926, from a decree of the Dist. J., Jullundur, D/- 30th November 1925.

(*a*) *Provincial Small Causes Courts Act, S. 15—Suit for recovery of money recovered as rent after expiry of lease to recover rent—Small Cause Court has jurisdiction.*

Plaintiff, a muafidar, granted a lease to defendant to recover rent for a certain period. The defendant continued to recover rent even after the termination of lease. Plaintiff brought a suit for the recovery of the sum realized by defendant for the period beyond the lease.

Held: that the suit was cognizable by Small Cause Court: 35 *P. R.* 1902, *Foll.*

(*b*) *Punjab Courts Act, S. 44—Appeal heard by superior Court—Revision does not lie.*

The mere fact that an appeal has been heard by a superior Court is not a ground for revision unless there has been a material prejudice: 36 *P. R.* 1902, *Foll.*

Merely follows (*a*) 35 *P. R.* 1902 and (*b*) 36 *P. R.* 1902.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 144 (3)
(*Oudh*)
STUART, C. J., AND RAZA, J.

Suraj Prasad—Accused—Appellant.

v.

King-Emperor—Opposite Party.

Criminal Appeal No. 99 of 1926, Decided on 26th March 1926, from the order of the 2nd Addl. S. J., Unao, D/- 8th February 1926.

Penal Code, S. 302—Unprovoked and cowardly assault by surprise and striking only one blow which fractured the skull—Offence is murder.

Where the accused committed an unprovoked and cowardly assualt upon the deceased rushing out at him by surprise and striking him one blow and one blow alone upon the head with a lathi and the blow fractured the skull of the deceased from temple to temple, the offence is murder: *A. I. R.* 1923 *All.* 592, *Foll.*

Simple point.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 144 (4)
(*Allahabad*)
DANIELS, J.

Sunder Lal-Kapoor Chand—Defendant—Applicant.

v.

Bhawan Prasad-Kamta Prasad — Plaintiff—Opposite Party.

Civil Revisions Nos. 35 and 36 of 1926, Decided on 5th May 1926, from an order of the Small Cause Court J., Allahabad, D/- 25th January 1926.

Civil P. C., S. 11—Cross-suits—Parties and issues same—One decided before the other—Decision in the former is res judicata in the latter.

Where, in both of the cross-suits between the same parties the question at issue arising out of the same transaction is the same, and one is decided before the other, the decision in the suit decided first is res judicata against the other.

Common point; for instance see 32 *All.* 67; *A. I. R.* 1923 *Cal.* 496; 1925 *Lah.* 596 (2); 24 *Mad.* 350; 11 *All.* 148; 12 *All.* 578.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 145 (1)

(Lahore)

FFORDE, J.

Hira Singh and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 487 of 1926, Decided on 28th July 1926, from the order of the 1st Cl. Mag., Ferozepore, D/- 15th April 1926.

Criminal trial—Witnesses important for the case—Every attempt should be made to secure their evidence.

A Court should make every attempt to secure the evidence of persons whose evidence is extremely important for the case, either by procuring their attendance or by having their evidence taken on commission.

Point simple.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 145 (2)

(Oudh)

RAZA, J.

Sheo Mangal—Plaintiff—Appellant.

v.

Mata Pershad—Defendant—Respondent.

Second Appeal No. 526 of 1924, Decided on 12th February 1926, from a decree of the Sub-J., Partabgarh, D/- 22nd September 1924.

Jurisdiction—Civil and revenue Courts—Suit to contest notice of ejectment under Oudh Rent Act (22 of 1886), S. 108, in revenue Court—Civil suit on the same question is barred.

Where a suit has been brought in a revenue Court to contest the notice of ejectment under S. 108, Cl. (8) of the Oudh Rent Act and the revenue Court decrees the suit holding the plaintiff to be a tenant-in-chief and not a sub-tenant, a civil suit by the defendant that he was the tenant-in-chief and that the plaintiff in the revenue suit was his sub-tenant is not maintainable, the sole object of such a suit being to get the decision of the revenue Court set aside by the civil Court: *A. I. R.* 1926 *Oudh* 205; *A. I. R.* 1922 *All.* 336 and *A. I. R.* 1925 *Oudh* 388, *Foll.*

Follows A. I. R. 1926 *Oudh* 205 and *A. I. R.* 1925 *Oudh* 388.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 145 (3)

(Lahore)

COLDSTREAM, J.

Indar Singh and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 583 of 1926, Decided on 13th July 1926, from the order of the S. J., Ludhiana, D/- 8th May 1926.

Penal Code, S. 399—Persons hiding near a village armed with gun—Conviction for preparation for committing dacoity is proper.

Where certain persons were found attempting to conceal their identity and were also found armed with a gun which they used while pursued by the villagers,

Held: that they were rightly convicted for preparation to commit dacoity: 6 *P. R.* 1916, *Foll.*

On facts. Also follows 6 *P. R.* 1916.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 145 (4)

(Oudh)

WAZIR HASAN, J.

Sheo Ratan—Defendant—Appellant.

v.

Lallu—Plaintiff—Respondent.

Second Appeal No. 519 of 1925, Decided on 8th April 1926, from a decree of the Sub-J., Gonda, D/- 18th August 1925.

Co-sharer—One co-sharer cultivating common land—Others' remedy is partition.

The action of one co-sharer in cultivating the common land has not the effect of ousting the other co-sharer as the former has a right to cultivate and the latter's remedy if he has any objection to the plaintiff's user of the common land is to obtain a partition: *A. I. R.* 1924 *P. C.* 144, *Foll.*

Follows A. I. R. 1924 *P. C.* 144.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 84

A. I. R. 1926 Journal 146 (1)

(*Lahore*)

JAI LAL, J.

Zahur-ud-Din and *another*—Plaintiffs—Appellants.

v.

Municipal Committee of Hissar and *others* — Defendant and Plaintiffs — Respondents.

Second Appeal No. 498 of 1926, Decided on 7th June 1926, from the decree of the Dist. J., Hissar, D/- 13th November 1925.

Punjab Municipal Act (3 *of* 1911), *S.* 172—*Encroachment made* 20 *years ago—Notice cannot be issued.*

The Municipal Committee is not competent to issue a notice under S. 172 in respect of the encroachments which were made about twenty years ago : 2 *P. R.* 1915 (*Cr.*), *Foll.*

Simply follows 2 *P. R.* 1915 *Cr.*

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 146 (2)

(*Bombay*)

SHAH AND FAWCETT, JJ.

Emperor—Appellant.

v.

Chhitia Dhuriya—Accused—Respondent.

Criminal Appeal No. 114 of 1926, Decided on 8th July 1926, from an order of the Hony. Bench Mags., Ankleshvar.

Bombay District Police Act (*Bom. Act* 4 *of* 1890), *S.* 61 (*a*)—*Ignorance of law is no excuse.*

That the driver accused was ignorant of the requirements of law, by itself would not be a lawful excuse within S. 61 (a), for his driving a cart without a lamp.

Point simple and obvious.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 146 (3)

Lahore)

CAMPBELL, J.

Indraj and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revision No. 561 of 1926, Decided on 11th June 1926, from an order of the Dist. Mag., Gurgaon, D/- 14th March 1926.

Criminal P. C., S. 437—*Further enquiry after discharge is improper unless order of discharge is manifestly perverse or foolish.*

A direction for further enquiry after discharge is improper unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which is obviously incomplete : 10 *P. R.* 1911 (*Cr.*), *Foll.*

Merely follows 10 *P. R.* 1911 *Cr.*

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 146 (4)

(*Lahore*)

JAI LAL, J.

Mt. Mul Kuar—Defendant—Appellant.

v.

Diwan Chand and *others*—Plaintiffs—Respondents.

Second Appeal No. 585 of 1926, Decided on 13th May 1926, from an order of the Addl. Dist. J., Lahore, D/- 15th January 1926.

Civil P. C., S. 11—*Question left open is not barred.*

Where a particular question in dispute is expressly left open for a separate proceeding, the question does not become res judicata in a subsequent suit.

Section 11, *Civil P. C., is clear.*

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 146 (5)

(*Lahore*)

DALIP SINGH, J.

Usman—Accused—Petitioner.

v.

Mt. Jatti—Complainant—Respondent.

Criminal Revision No. 596 of 1926, Decided on 4th June 1926, reported by the S.-J., Mianwali.

Criminal P. C., S. 488—*Sub-S.* (3), *proviso* 1.

When husband is willing to maintain his wife, proviso to sub-S. 3 must be complied with.

Too simple a point.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 147 (1)

(Allahabad)

DANIELS .

Mathura Prasad—Accused.

v.

Municipal Board, Etawah—Opposite Party.

Criminal Reference No. 38 of 1926, Decided on 18th February 1926, made by the Addl. S. J., Etawah, on 7th December 1925.

United Provinces Municipalities Act (1916), *S.* 307 (*b*)—*Order respecting future offence passed at first conviction is illegal.*

A Magistrate cannot at the time of original conviction pass an order in respect of a future offence. There must be a separate prosecution and a separate conviction after the accused has failed to comply with the order and has rendered himself liable to a continuing fine : 40 *All.* 569 and *A. I. R.* 1921 *All.* 267, *Foll.*

Simply follows 40 *All.* 569 and *A. I. R.* 1921 *All.* 267.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 147 (2)

(Oudh)

HASAN, J.

Kesho Prasad and *another*—Plaintiffs—Appellants.

v.

Gaya Bux Singh and *others*—Defendants—Respondents.

Second Appeals Nos. 50 and 51 of 1926, Decided on 19th February 1926, from a decree of the Addl. Dist. J., Hardoi, D/- 4th November 1925.

Co-sharer—Joint possession—Co-sharers not agreeing as to the use of common land—Remedy is by way of partition and not by a suit for joint possession.

When co-sharers cannot agree as to how any lands held by them in common may be used, the remedy of any co-sharer who objects to the exclusive use by another co-sharer of lands held in common is to obtain partition of the lands, and a suit for joint possession does not lie : *A. I. R.* 1924 *P. C.* 144, *Foll.*

Follows A. I. R. 1924 *P. C.* 144.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 147 (3)

(Oudh)

STUART, C. J.

Shair Ali— Plaintiff—Applicant.

v.

Jurawan—Defendant—Opposite Party.

Civil Revision No. 42 of 1926, Decided on 30th March 1926, from the order of the Munsif, Fatehpur, at Bara Banki, D/- 2nd February 1926.

Civil P. C., O. 20, *R.* 4—*Small Cause Court judgment need not contain reasons.*

A judgment of a Small Cause Court need not contain reasons and is not a bad judgment in law because it does not contain reasons : 8 *O. C.* 44, *Expl.*

Order 20, *R.* 4 (1) *is clear.*

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 147 (4)

(Lahore)

BROADWAY, J.

Mt. Mahandan—Appellant.

v.

Mt. Aishan Bibi—Respondent.

Miscellaneous First Appeal No. 624 of 1926, Decided on 3rd June 1926, from an order of the Senior Sub-J., Gujranwala, D/- 9th January 1926.

Guardians and Wards Act, S. 7—Dispute between rival claimants for guardianship of property—Likelihood of property being lost—Appointment of guardian of property should not be refused.

Where there was a dispute among the rival claimants for the appointment of guardian endangering the property of the minor and the Court accepted arrangement by which the contestants took each half of the property, but later on ordered delivery of whole property to one of them :

Held : that it was desirable that guardian should be immediately appointed for the property of the minor and proper steps taken for the safeguard of the property.

On facts.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 148 (1)

(Allahabad)

SULAIMAN AND MUKERJI, JJ.

Chandar Shekhar Bux Singh—Plaintiff—Appellant.

v.

Mt. Bhagwati Devi and *others*—Defendants—Respondents.

Second Appeal No. 604 of 1926, Decided on 3rd June 1926, from a decree of the Sub-J., Mainpuri, D/- 20th February 1926.

Pre-emption—Village consisting of one mahal—Custom ceases to exist when only one proprietor owns it.

Where the whole of a village consisting of only one mahal comes to be owned by a single proprietor, the custom of pre-emption is extinguished and does not merely fall in abeyence; 39 *All.* 480, *Foll.*; *A. I. R.* 1924 *All.* 425, *Dist.*

Simply follows 39 *All.* 480.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 148 (2)

(Lahore)

FFORDE, J.

Sohna—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 646 of 1926, Decided on 27th July 1926, from the order of the Dist., Mag., Shahpur, at Sargodha, D/- 12th January 1926.

(*a*) *Criminal P. C., S.* 110—*Witnesses having commercial dealings with accused is not sufficient to exclude their evidence.*

The mere fact that some of the witnesses are persons who have had commercial dealings with the appellants, and others are persons of the same class and position as the appellant, is not a sufficient ground to exclude their evidence in a case under S. 110.

(*b*) *Criminal P. C., S.* 110—*Suspicion is no sufficient ground.*

Mere suspicion, and mere allegations that a person is a man of ill repute, is not sufficient to base an order under S. 110.

Common point.

For (*a*) *See A. I. R.* 1923 *All.* 35; 43 *All.* 106.

For (*b*) *See A. I. R.* 1923 *All.* 595; *A. I. R.* 1924 *Pat.* 498.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 148 (3)

(Oudh)

RAZA, J.

Indarjit Singh—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revision No. 52 of 1926, Decided on 26th May 1926, from an order of the S. J., Rae Bareli, D/- 15th May 1926.

Criminal P. C., Ss. 195 *and* 476—*Proceedings in respect of offence under S.* 409, *I. P. C., cannot be started under S.* 476.

Offence under S. 409, Indian Penal Code, is not one of the offences referred to in S. 195 or S. 476, Criminal P. C., and therefore no proceedings can be started against the accused under S. 476 in respect of an offence under S. 409.

Criminal P. C., S. 195, *is clear. It does not refer to Penal Code S.* 409.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, and 81.

A. I. R. 1926 Journal 148 (4)

(Lahore)

JAI LAL, J.

Bichha Ram and *others*—Plaintiffs—Appellants.

v.

Jhandu Mal and. *others*—Defendants—Respondents.

Miscellaneous Second Appeal No. 739 of 1926, Decided on 10th June 1926, from an order of the Senior Sub-J., Karnal, D/- 23rd December 1925.

Civil P. C., O. 41, *R.* 23—*Trial Court deciding suit on merits after taking evidence of both parties—Remand under R.* 23 *is not justified.*

Where the suit had not been disposed of by the trial Court on a preliminary point, but it had been decided on the merits after the entire evidence produced by both the parties had been recorded and proper issues had been framed by the trial Court and evidence had been given by both the parties,

Held: that remand under O. 41, R. 23, was not justified.

Covered by O. 41, *R.* 23, *itself.*

See also Law Reporting Rules : *A. I. R.* 1926, *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 149 (1)

(Calcutta)

SUHRAWARDY AND DUVAL, JJ.

Umed Sheikh and *others*—Accused-Appellants.

v.

King-Emperor—Opposite Party.

Criminal Appeal No. 61 of 1926, Decided on 27th April 1926, from an order of the S. J., Murshidabad.

(a) *Criminal P. C., S. 237—Charge under S. 302 or in alternative under S. 201, I. P. C.—Conviction under latter only is legal.*

Where an accused is charged under S. 302, Indian P. C., for murder and in the alternative under S. 201, Indian P. C., for concealing or disposing of the evidence of commission of that offence, he can be convicted under S. 201 when the charge under S. 302 is not made out : *A. I. R. 1925 P. C. 130. Expl.* and *Foll.*

(b) *Evidence Act, S. 133—Accomplice.*

A person who has knowledge of the commission of an offence but keeps quiet for some days is no better than an accomplice : 21 *Cal.* 328 and 24 *W. R.* 55 *(Cr.), Foll.*

(a) *Follows A. I. R. 1925 P. C. 130.*

(b) *Follows* 21 *Cal.* 323 and 24 *W. R.* 55 *(Cr.).*

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 149 (2)

(Lahore)

JAI LAL, J.

Kirm Chand—Plaintiff—Appellant.

v.

Akbar Khan and *others*—Defendants—Respondents.

Second Appeal No. 897 of 1926, Decided on 13th July 1926, from the decree of the Dist. J., Campbellpur, D/- 4th January 1926.

(a) *Landlord and tenant—Denial of landlord's title in pleadings—Landlord cannot terminate tenancy and obtain benefit of disclaimer in the same suit.*

Disclaimer contained in the pleadings of the plaintiff does not entitle the landlord to terminate the tenancy and to obtain possession of the demised premises in the proceedings in which the disclaimer takes place : *A. I. R. 1924 Lah. 281 (2), Foll.*

(b) *Practice—Appeal—New plea canot be entertained.*

A plea of disclaimer not taken by the defendant in his pleadings and as to which no issue has been struck cannot be entertained in appeal.

(a) *Merely follows A. I. R. 1924 Lah. 281 (2).*

(b) *Simple point.*

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 149 (3)

(Oudh)

RAZA, J.

Bijrang Singh and *another*—Plaintiffs—Appellants.

v.

Mt. Abadan and *others*—Defendants—Respondents.

Second Appeal No. 52 of 1926, Decided on 19th February 1926, from a decree of the Sub-J., Rae Bareli, D/- 24th November 1925.

Civil P. C., S. 100—Concurrent finding cannot be impugned.

Concurrent finding cannot be impugned in second appeal,

Common point : See A. I. R. 1925 Lah. 332 (2) ; 1923 Lah. 11 (2) ; 1925 Nag. 271 ; 1925 Pat. 384 ; 8 O. L. J. 4 ; 186 P. L. R. 1914 ; 239 P. L. R. 1914 ; A. I. R. 1923 Rang. 196.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 149 (4)

(Allahabad)

KANHAIYA LAL AND BOYS, JJ.

Yad Ram—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 70 of 1926, Decided on 25th February 1926, from an order of the S. J., Moradabad, D/- 22nd December 1925.

Criminal P. C., S. 403—Acquittal under Penal Code, S. 325/147 does not bar subsequent trial under Penal Code, S. 302.

Trial and acquittal of an accused under Penal Code, S. 325 with 147 does not bar his subsequent trial on the same facts under Penal Code, S. 302 : 42 *All.* 128 and 24 *Mad.* 16, *Foll.*

Simply follows 42 *All.* 128.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 150 (1)

(*Lahore*)

ZAFAR ALI AND ADDISON, JJ.

Sher Bahadur and *another*—Defendant—Appellant.

v.

Abezar and *others*—Plaintiffs—Respondents.

First Appeal No. 1836 of 1921, Decided on 22nd April 1926, from a decree of the Senior Sub-J., Shahpur, at Sargodha, D/- 4th May 1921.

(*a*) *Punjab Land Revenue Act* (1887), *S.* 44—*Presumption of new entries was held rebutted by series of old entries when the change could not be explained.*

The presumption attaching to new entries regarding Khewat is sufficiently rebutted by a long series of old contrary entries when it is not clear what influenced the revenue authorities in making the change.

(*b*) *Limitation Act*, *S.* 5—*O.* 22, *R.* 9—*Dead party living long distance—Applicant found to be otherwise diligent—Time was extended.*

In an appeal which had been long pending and had numerous parties, a party failed to make an application for bringing the legal representatives of a deceased party living at a long distance within time, due to ignorance of the latter's death. But he had been diligent in making several other applications of the same nature.

Held: under S. 5 time for making an application for setting aside abatement should be extended.

(*c*) *Civil P. C.*, *O.* 22, *Rr.* 3 *and* 4—*Letter to Court informing a party's death and the fact that his representatives were on the record already was held sufficient and Court-fee was allowed to be paid for the application.*

A letter to the Court within time intimating the death of a party and the fact of his legal representatives being already on the file was treated as an application for bringing the legal representatives of the deceased on the record and the necessary Court-fee was allowed to be paid up.

Simple points.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 150 (2)

(*Calcutta*)

C. C. GHOSE AND DUVAL, JJ.

Hara Mohan Das—Petitioner.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 6 of 1926, Decided on 19th February 1926, against the decision of the S. J., Assam Valley District, D/- 14th November 1925.

Penal Code, Ss. 471 *and* 196—*Trial under S.* 196—*Facts disclosing offence under S.* 471—*Trial of Sessions Court was ordered.*

Where petitioner was tried for an offence under S. 196 and convicted but from the facts it appeared that an offence under S. 471 was committed, which is exclusively triable by Sessions Court, the conviction was set aside and trial by Court of Sessions was ordered.

Simple point.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 150 (3)

(*Nagpur*)

FINDLAY, O. J. C.

Shaikh Dilawar—Accused—Applicant.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 72 of 1926, Decided on 23rd March 1926, from the judgment of the S. J., Nagpur, D/- 19th January 1926, in Criminal Appeal No. 4 of 1925.

Crtminal trial—Procedure.

Court cannot compel a witness, e. g., the investigating officer, to refer to the diary : 8 *Cal.* 154, *Foll.*

Simply follows 8 *Cal.* 154 *and point simple.*

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 150 (4)

(*Allahabad*)

DANIELS, J.

Babu Ram—Plaintiff—Applicant.

v.

Badri Das and *another*—Defendants—Opposite Parties.

Civil Revision No. 18 of 1926, Decided on 8th April 1926, from an order of the Small Cause Court J., Kairana.

Contribution—Costs.

Prima facie a right of contribution exists between persons against whom a joint decree for costs has been passed and it is for a defendant seeking to avoid liability to show some equity which entitles him to exemption : 43 *All.* 77, *Foll. A. I. R.* 1923 *All.* 67 ; *Appr. A. I. R.* 1923 *Bom*, 24 *O. C.* 318 and 4 *P. L. J.* 486, *Ref.*

Simply follows 43 *All.* 77.

See also Law Reporting Rules : *A. I. R*, 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 151 (1)

(Allahabad)

KANHAIYA LAL, J.

Chain Sukh—Defendant—Appellant.

v.

Ram Sarup and *others*—Plaintiffs—Respondents.

Second Appeal No. 83 of 1926, Decided on 15th February 1926, from a decree of the Sub-J., Muttra, D/- 31st October 1925.

Civil P. C., S. 96 (3)—Parties agreeing to accept Court's decision on inspection—Decree passed after inspection is final and non-appealable irrespective of Sch. 2, Civil P. C.

Where both the parties stated that the Court may inspect the locality in dispute and they will be bound by the decision on inspection and agreed not to give evidence.

Held: that a decree passed in accordance with that decision is a consent decree, not subject to provisions of Sch. 2, Civil P. C., and is final and non-appealable: *A. I. R.* 1925 *All.* 558 and 42 *Mad.* 625, *Foll.*

Simply follows *A. I. R.* 1925 *All.* 558.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 151 (2)

(Sind)

KENNEDY AND TYABJI, A. J. Cs.

Loung and *others*—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 4 of 1926, Decided on 27th January 1926, from a judgment of the Addl. S. J., Hyderabad (Sind), D/- 10th November 1925.

Criminal P. C., S. 420—Appeal under S. 420 can be summarily dismissed under S. 421.

The practice of the Court in dismissing summarily appeals filed by accused through jailor under S. 420 without calling on the appellant to appear is a correcs procedure.

Section is clear.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 151 (3)

Lahore)

FFORDE AND CAMPBELL, JJ.

Mool Chand—Defendant—Appellant.

v.

Bhole and *another*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 2490 of 1922, Decided on 20th May 1926, from a decree of the Dist. J., Gurgaon at Hissar, D/- 19th June 1923.

Custom (Punjab)—Alienation—Widow's debts will not be antecedent without clear proof of real necessity.

Without clear proof of real necessity a widow's debts cannot be treated as just antecedent debts enabling her to transfer her husband's lands.

Common point: See *A. I. R.* 1924 *Lah.* 298; *A. I. R.* 1923 *Lah.* 245; 156 *P. R.* 1919; 2 *P. R.* 1911

See also Law Reporting Rules: *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 1919; 2 *P .R.* 69, 73 and 81.

A. I. R. 1926 Journal 151 (4)

(Patna)

JWALA PRASAD AND MACPHERSON, JJ.

Dinamani Udaipal Ram Tewary—Accused—Appellant.

v.

King-Emperor—Opposite Party.

Criminal Appeal No. 77 of 1926, Decided on 3rd June 1926, from a judgment of the Addl. J. C., Chota Nagpur, D/-20th March 1926.

Criminal trial—Circumstantial evidence—Penal Code, S. 302.

Where no direct evidence of murder is adduced and the case depends only on circumstantial evidence, the evidence must be inconsistent and incompatible with the innocence of the accused.

Simply on facts.

See also Law Reporting Rules: *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 151 (5)

(Allahabad)

DANIELS, J.

Ratan Mani—Applicant.

v.

Hans Ram and *others* — Opposite Party.

Criminal Revision No. 635 of 1925, Decided on 24th November 1925, against the order of Dist. Mag., Almora.

Criminal P. C., S. 209—Committing Magistrate finding prosecution evidence to be unworthy of credit—Discharge is proper. . . . .

When a committing Magistrate in a case triable by Sessions Court finds that the prosecution evidence is totally unworthy of credit it is his duty to discharge the accused : 35 *Bom.* 163 and *A. I. R.* 1924 *All.* 664, *Foll.*

Simply follows A. I. R. 1924 *All.* 664.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 152 (1)

(*Allahabad*)

WALSH AND KANHAIYA LAL, JJ.

Bahora Sri Kishen and *another*—Defendants—Appellants.

v.

Kunwar Chandra Sekhar Baksh Singh and *others*—Plaintiffs —Respondents.

First Appeal No. 200 of 1925, Decided on 11th December 1925, from an order of the Dist. J., Mainpuri.

Pre-emption — Partition — On partition each co-sharer ceases to be joint owner.

Ordinarily, where a partition has taken place, the joint ownership is destroyed, and each mahal beeomes a separate unit for the purpose of regulating the rights of the co-sharers, forming the proprietary body of that mahal inter se.

Simple point.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 152 (2)

(*Allahabad*)

KING, J.

Bhagmal—Defendant—Appellant.

v.

Sitaram and *another*—Plaintiffs—Respondents.

Second Appeal No. 25 of 1924, Decided on 19th May 1926, from a decree of the Sub-J., Muzaffernagar, D/- 9th October 1923.

Limitation Act, Art. 138—*Auction-purchaser not suing for possession within* 12 *years—His remedy is barred—No question of adverse possession arises.*

The auction purchaser must institute a suit for possession of the property purchased by him in execution of a decree within 12 years from the date when the sale becomes absolute and any question of adverse possession in favour of person holding against him is irrelevant.

Covered by the article

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 152 (3)

(*Allahabad*)

DANIELS, J.

East Indian Railway—Defendants—Petitioners.

v.

Baldeo Gutain — Plaintiff— Opposite Party.

Civil Revision No. 139 of 1925, Decided on 5th January 1926, from an order of the Small Cause Court Judge, Jhansi, D/- 24th July 1925.

(*a*) *Railways Act* (9 *of* 1890), *S.* 72—*Wilful negligence.*

Sealing a wagon with paper only constitutes wilful negligence : *A. I. R.* 1925 *All.* 562, *Foll.*

(*c*) *Contract Act, S.* 231—*Railway receipt in the name of agent—Real owner can sue for damages for loss of goods.*

Even where a railway receipt is granted in the name of a servant or agent, the real owner of the goods can claim for their value if lost.

(*a*) *Simply follows A.I.R.* 1925 *All.* 562.

(*b*) *Is mainly explained by section.*

See also Law Reporting Rules : *A. I. R.* 1929 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 152 (4)

(*Oudh*)

RAZA, J.

Jeorakhan—Defendant—Appellant.

v.

Mt. Goura and *another*—Plaintiffs—Respondents.

Second Appeal No. 241 of 1925, Decided on 20th March 1926, from a decree of the Addl. Sub-J., Hardoi, D/- 31st March 1925.

Practice—Burden of proof—Evidence adduced by both parties and conclusion arrived at—Question of burden of proof becomes immaterial.

Where evidence has been produced by both parties on a particular point and the Court has come to a conclusion on consideration of that evidence, the question of burden of proof becomes a matter of pure academic interest.

Point very common : *A.I.R.* 1922 *P. C.* 292 ; 43 *Mad.* 567 (*P. C.*) ; *A. I. R.* 1925 *Cal.* 1262 ; 44 *Cal.* 858 (*P. C.*) ; *A. I. R.* 1924 *Cal.* 855 ; *A.I.R.* 1922 *Cal.* 451 (2) ; 1922 *Oudh* 271 ; 2. *O. L. J.* 140.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 153 (1)

(*Allahabad*)

DANIELS, J.

Secretary of State and *another*—Applicants.

v.

Makund Lal and *another*— Opposite Party.

Civil Revisions Nos. 136 and 137 of 1925, Decided on 5th January 1926, from an order of the Small Cause Court J., Aligarh.

Railways Act, S. 54—Rules for carrying goods —Consignor charged less—Railway mistake— Railway receipt providing for re-measuring, re-weighing and re-classifying goods at destination—Difference of charge can be recovered at destination.

The Station Master by mistake charged goods at a lower rate. On arrival at destination the mistake was discovered and the difference between the amount paid and the correct charge was recovered from the consignors. There was a condition in the railway receipt which permitted the railway to remeasure, re weigh or reclassify the goods or re-calculate the rates and other charges at destination.

Held : that the difference of rate was properly realized at destination.

Question of mere construction.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 153 (2)

(*Oudh*)

WAZIR HASAN, J. C.

Abdul Wahab—Accused—Applicant.

v.

Emperor (*through Mohammad Husain*) —Complainant—Opposite Party.

Criminal Application No. 139 of 1925, Decided on 6th October 1925, against an order of the S. J., Rae Bareli, D/- 6th August 1925.

Criminal P. C., S. 145—Fact of actual possession is to be considered and not the right to possession.

In a proceeding under S. 145 the main point to be considered is the fact of actual possession and not the right of a party to possess the subject-matter of dispute.

Simple point.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 153 (3)

(*Allahabad*)

MEARS, C. J., AND LINDSAY, J.

Ram Chandra Naik Kalia and *others* —Judgment-debtors—Appellants.

v.

Nazar Ali—Decree-holder— Respondent.

Letters Patent Appeal No. 9 of 1925, Decided on 4th March 1926, from a judgment of Mukerji, J.

Limitation Act, Art. 182 (2)—Appeal preferred but withdrawn.

Where an appeal is filed but withdrawn an application to execute within three years of withdrawal is not time barred.

Art. 182 (2) is clear.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 153 (4)

(*Oudh*)

RAZA, J.

Ram Dayal—Plaintiff—Appellant.

v.

Nisar Husain Khan—Defendant—Respondent.

Second Appeal No. 1 of 1925, Decided on 7th November 1925, from a decree of the Sub-J., Lucknow, D/- 6th September 1925.

(a) Easement Act (1882), *S. 60 (b)—License free of rent to construct building—Building—Construction—License cannot be revoked, nor when land is given rent free can damages be claimed for use and occupation.*

Where land had been given to a licensee free of rent for building a house thereon and the licensee built a permanent structure :

Held : that the license became irrevocable and the licensor could not afterwards revoke the license, nor could he claim damages for use and occupation.

(b) Civil P. C., O. 2, R. 2—Suit for ejectmen.

A suit by licensor for ejectment of licensee failing a second suit by licensor for damages for use and occupation is not maintainable.

Wording of S. 60, Easments Act and O. 2, R. 2 are clear.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61 ,69, 73 and 81.

A. I. R. 1926 Journal 154 (1)

(Nagpur)

FINDLAY, O. J. C.

Gopal and *another*—Plaintiffs—Appellants.

v.

Krishnarao—Defendant—Respondent.

Second Appeal No. 232 of 1925, Decided on 2nd December 1925, from the decree of the Addl. Dist J., Nagpur, D/- 24th January 1925, in Civil Appeal No. 86 of 1924.

Nuisance—Latrine, when it is a nuisance.

Whether a latrine constitutes a nuisance from the legal point of view must be judged by the general standard on the principle *lex non favet votis delicatorum*. The law favours not the wishes of the dainty and a particular latrine cannot be a nuisance if lartrines of the sort are common all over the city : 11 *N. L. R.* 132, *Foll.*

Follows 11 *N. L. R.* 132.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 154 (2)

(Oudh)

STUART, C. J., AND HASAN, J.

Jagdeo Singh—Plaintiff—Applicant.

v.

Deputy Commissioner, Partabgarh and *others*—Defendants—Opposite Party.

Application No. 15 of 1926, for leave to appeal to His Majesty in Council, Decided on 29th September 1926, from the judgment of the Chief Court reported in *A. I. R.* 1926 *Oudh* 431.

Civil P. C., S. 109—"*Substantial question of law*"—*Construction of document interesting parties alone is not one.*

The words "substantial question of law" mean question of general importance and they do not include the question of the construction of a document in which the parties alone are interested : 10 *O. C.* 308 ; 24 *All.* 174 ; *A. I. R.* 1926 *Oudh* 381 ; and *A. I. R.* 1924 *All.* 559 ; *Foll.*

Follows 10 *O. C.* 308 and *A. I. R.* 1926 *Oudh* 381.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal* pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 154 (3)

(Allahabad)

ASHWORTH, J.

Mohamed Fida Husain Khan—Plaintiff—Appellant.

v.

Hazari Singh and *others*—Defendants—Respondents.

Second Appeal No. 1858 of 1923, Decided on 3rd May 1926, from a decree of the Dist. J., Shahjehanpur, D/- 21st September 1923.

Agra Tenancy Act, S. 154 — *Rent-free grant with condition not to sell or mortgage can be resumed if the condition is broken.*

Where in respect of a muafi land the wajib-ul-arz provided : "The rent of this land has been excused from of old, and no services are required. For the future also, the land shall continue to be rent free, but the muafidar shall not have the power to sell or mortgage.",

Held : that the land was resumable in case of sale or mortgage.

Question of mere construction.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 154 (4)

(Nagpur)

FINDLAY, O. J. C.

Kesho Rao Ganpat Rao—Defendant—Appellant.

v.

Pandurang and *others*—Plaintiffs and Defendants 2 to 6—Respondents.

First Appeal No. 63-B of 1925, Decided on 30th March 1926, against the decree of the Sub-J., 1st Cl., Yeotmal, D/- 20th June 1925 in Civil Suit No. 28 of 1923.

Decree— Setting aside— Fraud— Decree obtained by fraud can be set aside by separate suit.

Where a decree has been obtained by a fraud practised on another, by which that other has been prevented from placing his case before the tribunal which was called upon to adjudicate upon it, the decree is not binding on him and may be set aside in a separate suit : 21 *Cal.* 612, *Foll.* 16 *C. W. N.* 1002, *Dist.*

Common point. See *A. I. R.* 1923 *All.* 566 ; 1924 *Bom.* 460 ; 1923 *Cal.* 538 ; 48 *Cal.* 298 ; *A. I. R.* 1923 *Pat.* 327.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 155 (1)

(Allahabad)

WALSH AND DALAL, JJ.

Johari Mal and *others* — Plaintiffs — Appellants.

v.

Chandra Sen and *another*— Defendants—Respondents.

First Appeal No. 215 of 1925, Decided on 13th April 1926, from an order of the Dist. J., Bareilly, D/- 2nd October 1925.

Civil P. C., O. 17, Rr. 3 and 2—Party present but unable to produce evidence—Suit cannot be dismissed under R. 2.

Where a party is present but fails to produce evidence, and the suit is dismissed as for default, the suit must be deemed to be dismissed under R. 3 and not R. 2 and an appeal lies from the dismissal.

Civil P. C., O. 17, Rr. 2 and 3 are clear.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 155 (2)

(Oudh)

STUART, C. J.

Sheo Nath and *others*—Petitioners.

v.

King-Emperor—Opposite Party.

Criminal Reference No. 5 of 1926, Decided on 17th February 1926, made by the 2nd Addl. S. J., Lucknow at Unao.

Penal Code, Ss. 147 and 452—Separate sentences for both offences can be passed although part of the same transaction.

Separate sentences may be passed under S. 147 and any other section under which the accused may be found guilty, e. g., separate sentences can be passed for rioting under S. 147 and for house-trespass after preparation for causing hurt under S. 452: 17 *O. C.* 184, *Foll.*

Follows 17 *O. C.* 184.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 155 (3)

(Allahabad)

SULAIMAN, J.

King-Emperor—Complainant.

v.

Barhma Singh—Accused.

Criminal Reference No. 252 of 1925, Decided on 26th March 1926.

Criminal P. C., S. 341—Accused found able to understand the proceedings—Trying Court should pass sentence if offence is established.

Where the jury find and the Judge agrees with the jury that the accused was able to follow the proceedings in Court and to understand the same, it is the duty of the Judge to convict the accused of the offence with which he is charged and to pass a sentence on him in accordance with law. He cannot leave the question of conviction and sentence in such a case to the High Court.

Section clearly covers.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 155 (4)

(Oudh)

STUART, C. J., AND RAZA, J.

Raghubir Singh and *others*—Plaintiffs —Appellants.

v.

Chatur Singh and *others* — Defendants —Respondents.

First Appeal No. 2 of 1925, Decided on 22nd March 1926, from the decree of the Sub.-J., Hardoi, D/- 3rd October 1924.

Registration Act, S. 17—Family arrangement filed in a mutation case requires no registration.

A compromise filed in a mutation case containing a recital of the terms agreed upon under a family arrangement need not be registered: 19 *O. C.* 75, *Foll.* 33 *All.* 356, *Rel. on.*

Follows 19 *O. C.* 75.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 155 (5)

(Allahabad)

DANIELS AND KING, JJ.

Harkesh and *another*—Plaintiffs—Appellants.

v.

Mamraj and *others*—Defendants—Respondents.

Second Appeal No. 1830 of 1923, Decided on 27th May 1926, from a decree of the Dist. J., Meerut, D/- 26th September 1923.

Jurisdiction—Suit between rival tenants is cognizable by civil Court.

A suit between rival claimants to a tenancy to which the landlord is not a party is cognizable by the civil Court: 33 *All.* 795; 35 *All.* 14; *A.I.R.* 1924 *All.* 231, *Foll.* 12 *A. L. J.* 1322, *Dist.*

Simply follows 33 *All.* 795; 35 *All.* 14; *A. I. R.* 1924 *All.* 231.

See also Law Reporting Rules: *A. I. R.* 1926, *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 156 (1)

(*Calcutta*)

CUMING AND B. B. GHOSE, JJ.

Dwarka Nath Karmakar—Decree-holder—Appellant.

v.

Lalit Mohan Karmakar —Judgment-debtor—Respondent.

Appeal No. 87 of 1925, Decided on 11th January 1926, from the appellate order of the 1st Sub-J., Dacca, D/- 9th December 1924.

Execution—Power of Court—Executing Court cannot go behind the decree.

It is not open to the executing Court to go behind the decree itself and to find that there was a contemporaneous arrangement that the decree should not be executed.

Too Common point : See *A. I. R.* 1924 *All.* 689 ; *A. I. R.* 1922 *Bom.* 195 ; 46 *Bom.* 503 ; 44 *All.* 659 ; *A. I. R.* 1924 *Lah.* 615 and 448 ; 35 *P. R.* 1900.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 156 (2)

(*Calcutta*)

WALMSLEY AND MUKERJI, JJ.

Khurshed Meerza and *another*—Plaintiffs—Appellants.

v.

Faizuddin Ali and *another*—Defendants—Respondents.

Appeal No. 107 of 1925, Decided on 4th August 1925, from the original decree of the Dist. J., Murshidabad, D/- 4th May 1925.

Religious Endowment Act, S. 10—Suit for holding election decreed and election held—Application to challenge election cannot be entertained by the same Court as an application in the suit.

Where on the death of one member of the Committee, two interested persons filed a plaint with the District Judge's permission, against the two remaining members as defendants, praying : (a) that the Court should direct the defendants to take proper steps for the holding of an election and fix a date within which the notices should be issued ; and (b) that the Court should remove one or both of the members in case of default, and the suit was decreed. A petition to the Judge by one of the defendants subsequent to the election objecting to the validity of the election cannot be entertained as an application in the suit.

Simple point.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 156 (3)

(*Nagpur*)

HALLIFAX, A. J. C.

Seth Kisanlal—Plaintiff—Appellant.

v.

Ramchandra and *others*—Defendants—Respondents.

First Appeal No. 90 of 1925, Decided on 1st April 1926, from the decree of the Dist. J., Chhindwara, D/- 23rd April 1925, in Civil Suit No. 1 of 1925.

Civil P. C., S. 35—Lower Court allowing costs in its discretion—Order cannot be disturbed in appeal—No reasons are necessary when costs follow the event.

Where lower Court has exercised discretion under S. 35, its order will not be disturbed in appeal. Costs to follow the event, and where the effect of order for costs is that only, no reasons to support it need be stated.

Simple point.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 156 (4)

(*Oudh*)

ASHWORTH, J.

Suraj Din—Judgment-debtor—Appellant.

v.

Khushal Ghosi—Decree-holder — Respondent.

Execution Second Appeal No. 72 of 1925, Decided on 21st January 1926, from an order of the Sub-J., Sultanpur, D/- 13th November 1925.

Decree execution — Executing Court cannot question validity of decree—Remedy is by separate suit.

It is not permissible for an executing Court to go into the question of the validity of the decree, and the only remedy in such a case should be the bringing of a separate suit.

Common point : See *A. I. R.* 1924 *All.* 689 ; 1922 *Bom.* 195 ; 1925 *Cal.* 203 ; 1924 *Lah.* 448 ; 1924 *Lah.* 615 ; 44 *Mad.* 675 ; 44 *Cal.* 627 ; *A. I. R.* 1923 *Mad.* 212.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 157 (1)

(*Allahabad*)

DANIELS AND KING, JJ.

Sheobaran Singh—Plaintiff — Appellant.

v.

Nirotam Singh and *others*—Defendants —Respondents.

Second Appeal No. 1466 of 1923, Decided on the 14th May 1926, from a decree of the Sub-J., Bulandhshahr, D/- 10th August 1923.

U. P. Land Revenue Act (3 *of* 1901), *S.* 233 (*k*) —*Partition suit of abadi land forming part of mahal cannot be maintained in civil Court.*

Where in a suit for partition the land in the khata which consists of the abadi of the village is not assessed to revenue but forms part of a mahal, the jurisdiction of the civil Court is barred by S. 233 (k) : 43 *All.* 45 and *A. I. R.* 1926 *All.* 360, *Foll.*

Simply follows A. I. R. 1926 *All.* 360 and 43 *All.* 45.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 157 (2)

(*Allahabad*)

DANIELS, J.

Ram Badan Upadhiya and *another*—Defendants—Applicants.

v.

Sankatha Misra and *others*—Plaintiffs —Opposite Parties.

Civil Revision No. 128 of 1925, Decided on 22nd December 1925, from an order of the Sub-J., Jaunpur, D/- 29th April 1925.

Civil P. C., O. 23, *R.* 1—*Order allowing a suit to be withdrawn with leave to bring fresh suit, without considering grounds for doing so, is revisable under S.* 115.

Where an order allowing a suit to be withdrawn with permission to file a fresh suit is passed without any reasons and without the Court applying its mind in the least to the question whether there were sufficient grounds to allow a withdrawal with permission to file a fresh suit, a revision application can be entertained : *A. I. R.* 1925 *All.* 466 and 47 *All.* 319, *Foll.*

Simply follows A. I. R. 1925 *All.* 466 *and* 47 *All.* 319.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 157 (3)

(*Nagpur*)

KINKHEDE, OFFG. A. J.C.

Mt. Mulia Bai and *another*—Defendants 2 and 3— Appellants.

v.

Amru and *others* — Plaintiffs and Defendants 4-6—Respondents.

First Appeal No. 13 of 1925, Decided on 19th March 1926, from the decree of the Sub-J., Jubbulpore, D/- 14th October 1924, in Civil Suit No. 34 of 1923.

(*a*) *Practice—Pleadings—Proof must accord with pleas.*

A claim should be decided *secundum et allegata et probata* and proof must accord with pleas. 33 *Bom.* 35, *Foll.*

(*b*) *Adverse possession—Limited owner.*

Adverse possession, if any, against a limited owner is not adverse possession against a reversioner : 41 *All.* 154 and 17 *N. L. R.* 18, *Foll.*

(*c*) *Will—Oral Will must be proved by precise words, time and place.*

The propounders of the oral Will must establish it by proof of the precise words of the testator with every circumstance as to place and time ; 12 *M. I. A.* 1 at 28 and 5 *N. L. R.* 85, *Foll.*

(a) *Common point* : See *A. I. R.* 1923 *A.* 358 ; 33 *B.* 35 ; 12 *M. I. A.* 470 ; 11 *M. I. A.* 7 ; *A. I. R.* 1924 *N.* 204 ; 1925 *M.* 384 ; 16 *S. L. R.* 207, *F. B.*

(*b*) *Follows* 17 *N. L. R.* 18.

(*c*) *Follows* 12 *M. I. A.* 1 (*P. C.*) and 5 *N. L. R.* 85.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 157 (4)

(*Oudh*)

DALAL, J. C.

Durga Baksh Singh — Plaintiff—Appellant.

v.

Jagannath Singh and *others*—Defendants—Respondents.

Second Appeal No. 8 of 1925, Decided on 14th September 1925, from a decree of the Sub-J., Rai Bareli, D/- 23rd September 1925.

Legal Practitioner—Mistake.

Where the counsel of the plaintiff committed a blunder which was apparent on the very face of the record.

Held : that plaintiff should not be deprived of a decree if as a matter of fact the pleas of the plaintiff were sustainable and the suit should be decided according to the pleas as put forward prior to the blunder by the counsel.

Simple point.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 158 (1)

(*Bombay*)

MACLECD, C. J. AND COYAJEE, J.

Mabel Panton—Plaintiff—Appellant.

v.

Administrator General of Bombay—Defendant—Respondent.

First Appeal No. 15 of 1925, Decided on 10th September 1925, from Suit No. 265 of 1924.

Advancement—No presumption as to, arises in cases of transfers in the name of wife or child—Person alleging the advancement must prove the contrary.

Where a husband or father pays the money and the purchase is taken in the name of the wife or child, there is no presumption of an intended advancement unless there is evidence of some other and sufficient motive for gift or transfer. The onus therefore lies on the person alleging the advancement to prove that the purchase made was intended to be advancement.

Common Point : See *A. I. R.* 1925 *P. C.* 181 ; 6 *M. I. A.* 53 ; 13 *M.I.A.* 232 ; 37 *All.* 557 (*P. C*). *A. I. R.* 1925 *Mad.* 95.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 158 (2)

(*Calcutta*)

RANKIN AND MUKERJI, JJ.

Mamat Ali and *others*—Accused.

v.

Emperor

Jury Reference No. 25 of 1925, and Criminal Appeal No. 322 of 1926, Decided on 2nd August 1926, from the order of the Asst. S. J., Assam Valley Dt., D/- 5th May 1926.

Criminal P. C., S. 297—Omission to direct on an important point in favour of accused is misdirection.

Ths omission to direct the jury upon an important point which may serve to help the defence of the accused amounts to misdirection.

Common point : See *A.I.R.* 1925 *C.* 666 ; 33 *C.L.J.* 180 ; 31 *C.L.J.* 20 ; 47 *C.* 46 ; 28 *C.* 989 : 25 *C.W.N.* 142 ; *A.I.R.* 1925 *O.* 311 ; *A. I. R.* 1923 *P.* 103.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 158 (3)

(*Calcutta*)

CUMING AND B. B. GHOSE, JJ.

Alfoo—Defendant—Appellant.

v.

Baburali Mia—Plaintiff—Respondent.

Letters Patent Appeal No. 29 of 1925, Decided on 6th January 1926, from a decree of Chakravarti, J., D/- 6th March 1925, in Appeal No. 2365 of 1922.

Civil P. C., S. 100—Admissibility of document is a question of fact—Objection to admissibility not taken in lower Courts cannot be taken in second appeal.

Whether a particular document is or is not admissible is a question of fact and not having been raised in the trial Court it is not open in second appeal to contend that the document is not admissible in evidence.

Common point : See *A. I. R.* 1924 *A.* 370 ; 1923 *C.* 378 ; 1924 *A.* 918 ; 1923 *A.* 91 ; 1922 *Cal.* 160 ; 36 *C. L. J.* 186 ; *A. I. R.* 1922 *Lah.* 281 ; 1924 *N.* 358.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 158 (4)

(*Oudh*)

NEAVE, A. J. C.

Muhammad Mohsin — Plaintiff—Appellant.

v.

Muhammad Abid and *others*—Defendants—Respondents.

Misc. Appeal No. 34 of 1925, Decided on 7th October 1925, from an order of the Sub-J., Hardoi, D/- 6th December 1924.

Civil P. C., O. 22, R. 9—Plaintiff living 100 miles away—No Judge for many months where case was pending—Abatement should be set aside.

Where the plaintiff was in service about a hundred miles away from the residence of the deceased and had therefore little opportunity of learning of the death of his adversary, and where owing to the temporary arrangements at the Court where the case was pending there was no Judge by whom the plaintiff's case could be taken up for many months.

Held ; that some latitude may be allowed and that the abatement should be set aside : 22 *O.C.* 72 and 21 *O. C.* 68, *Dist.*

Simply on facts.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 159 (1)

(Oudh)

WAZIR HASAN, J.

Ram Adhin and *another* — Defendants—Appellants.

v.

Riasat Ali—Plaintiff—Respondent.

Second Appeal No. 18 of 1925, Decided on 5th February 1926, from the decree of the 2nd Addl. Sub-J., Lucknow, D/- 13th October 1924.

Civil P. C., S. 100—*Findings of fact are conclusive in second appeal.*

Findings of fact are conclusive in second appeal if nothing is urged to show that they are in any manner vitiated by any error of law or procedure.

Common point : See *A. I. R.* 1924 *Cal.* 372; 1925 *Lah.* 333 (2); 1923 *L.* 236 (1); 1925 *Nag.* 271; 1923 *Oudh* 14; 24 *O. C.* 221; 8 *O. L. J.* 4; *A.I.R.* 1925 *P.* 384.

See also Law Reporting Rules: *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 159 (2)

(Oudh)

RAZA, J.

Dawarka—Defendant—Appellant.

v.

Sankatha—Plaintiff—Respondent.

Second Appeal No. 24 of 1925, Decided on 6th March 1926, from a decree of the Addl. Sub-J., Rai Bareli, D/- 20th October 1924.

(a) *Evidence Act, S.* 115—*No estoppel arises when a person builds a house on another's land in his absence.*

No question of estoppel by acquiescence can possibly arise where a person has built a house on another's land in the latter's absence.

(b) *Practice—New plea—Plea of estoppel by acquiesecence cannot be pleaded in argument when not raised in defence.*

When the plea of estoppel is not raised in defence, the Court can rightly reject it in argument.

Common points :

(a) See *A. I. R.* 1922 *P.* 619; 1925 *C.* 1107; 1924 *C.* 993; 1925 *O.* 258.

(b) *For similar cases* see *A. I. R.* 1926 *O.* 22 (2); 1923 *A.* 358.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 159 (3)

(Nagpur)

HALLIFAX AND KOTVAL, A. J. Cs.

Khwaja Kutubuddin and *another*—Applicants.

v.

Khwaja Gulam Rabbani and *others*—Non-applicants.

Misc. Petition No. 32-B of 1925, Decided on 5th November 1926.

(a) *Limitation Act, S.* 5—*Sufficient cause.*

Where an applicant on his own mistaken view files the appeal on the last possible day extension should not be granted.

(b) *Civil P. C., O.* 20, *R.* 1—*'Pronounced'—meaning of.*

A judgment cannot be said to be not pronounced merely because it is not read out entirely by the Court.

(c) *Limitation Act, S.* 12—*Date of decree.*

The date of decree means the date when the judgment is signed and not the date when the decree is signed.

Simple points.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal* pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 159 (4)

(Allahabad)

MEARS, C. J., AND LINDSAY, J.

Raghubir Singh and *others* — Applicants.

v.

Nathumal—Opposite Party.

Privy Council Appeal No. 35 of 1925, Decided on 7th January 1926, from an order of the High Court Bench.

(a) *Civil P. C., O.* 47, *R.* 1—*"Any other sufficient reason" means grounds analogous to those in R.* 1.

Order 47, R. 1 must be read as in itself definitive of the limits within which review of a decree or order is now permitted and the words "any other sufficient reason" mean grounds at least analogous to those specified in the rule: *A. I. R.* 1922 *P. C.* 112, *Foll.*

(b) *Civil P. C., S.* 109 (c)—*Point settled by a P. C. case—Leave to appeal cannot be granted.*

When there is a Privy Council decision setting the law on a point, the case cannot be certified as a fit case involving a substantial question of law.

(a) *Follows A. I. R.* 1922 *P. C.* 112.

(b) *Simple and obvious decision.*

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 & 81.

A. I. R. 1926 Journal 160 (1)

(*Allahabad*)

MEARS, C. J., AND MUKERJI, J.

Partap and *others*—Defendants—Appellants.

v.

Ram Sewak and *others*—Plaintiffs—Respondents.

Letters Patent No. 32 of 1925, Decided on 20th May 1926, from a judgment of Kanhaiya Lal, J., D/- 19th December 1924, in Second Appeal No. 409 of 1923.

(*a*) *Civil P. C., S.* 100—*Second Appeal—New case cannot be set up.*

The plaintiff should be pinned down to the specific case he has set up in the plaint and should not be allowed to set up a new case in the second appeal for which there was no adequate investigation in the lower Courts.

(*b*) *Civil P. C., O.* 6, *R.* 17—*Suit for redemption—Alleged mortgage not proved—Another and different mortgage cannot be substituted.*

Where a claim of plaintiff to redeem a particular mortgage fails, the plaintiff should not be allowed to substitute another and a different mortgage in place of the one which he had originally alleged.

Common points : (*a*) See *A. I. R.* 1924 *All.* 877 ; 43 *All.* 555 ; 19 *A. L. J.* 442 ; 1925 *Cal.* 1184 ; 1925 *Cal.* 225. (*b*) See *A. I. R.* 1922 *P. C.* 249 ; 1926 *Cal.* 189 ; 1925 *Mad.* 845 *for similar cases.*

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 160 (2)

(*Allahabad*)

DANIELS, J.

Tejpal and *another* — Plaintiffs—Appellants.

v.

Kalyan and *another* — Defendants — Respondents.

Second Appeal No. 460 of 1924, Decided on 29th June 1926, from a decree of the Dist. J., Agra, D/- 1st February 1924.

Civil P. C., O. 34, *R.* 14—*Sale in contravention of S.* 99 *of the Transfer of Property Act is not void but irregular.*

A sale in contravention of S. 99, T. P. Act, (now substituted by O. 34, R. 14 Civil P. C.) is merely irregular and is valid unless set aside before confirmation : 37 *All.* 165 (*F. B.*) ; 35 *Cal.* 61 and 47 *Cal.* 377, *Foll.*

Simply follows 37 *All.* 165 (*F. B.*).

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 & 81.

A. I. R. 1926 Journal 160 (3)

(*Oudh*)

ASHWORTH, A. J. C.

Atma Ram—Defendant—Appellant.

v.

Shambhu Din—Plaintiff—Respondent.

Second Appeal No. 32 of 1925, Decided on 6th October 1925, against the decree of the Addl. Sub.-J., Sitapur, D/- 16th December 1924.

Civil P. C., S. 100—*Suit for damages for malicious prosecution—Plaintiff's innocence and defendant's having no reasonable cause for complaint is a question of fact and cannot be questioned in second appeal.*

In a suit for damages for malicious prosecution the finding that the plaintiff was innocent of the charge and that the defendant had no just and reasonable cause for lodging a criminal complaint is one of fact and cannot be agitated in second appeal.

Common point : See *A. I. R.* 1925 *Oudh* 359 ; 25 *Bom.* 332 ; 28 *Cal.* 591.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 & 81.

A. I. R. 1926 Journal 160 (4)

(*Oudh*)

KENDALL, J.

Mohammad Hafiz Ali—Defendant — Appellant.

v.

Mahbub Ali—Plaintiff—Respondent.

Second Appeal No. 455 of 1924, Decided on 10th March 1926, from a decree of the Sub.-J., Lucknow, D/- 28th July 1924, in Appeal No. 241 of 1923.

Landlord and tenant—Abadi—Grandfather recorded in first abadi and in Settlement khasra as owner—Grandson plaintiff continuing in possession since then—Plaintiff's title is proved.

Where in the entry in the first abadi plaintiff's paternal grandfather was recorded as the owner of a particular plot and his name was entered in the subsequent Settlement khasra as owner of the plot, his grandson continued in possession in assertion of his title as owner :

Held : that plaintiff's title to the plot is proved.

Simply on facts.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33 41, 45, 53, 61, 69, 73 & 81.

A. I. R. 1926 Journal 161 (1)

(*Patna*)

DAWSON-MILLER, C. J., AND FOSTER, J.

Kirat Singh and *others*—Plaintiffs—Appellants.

v.

Sheojatan Singh and *others* —Defendants—Respondents.

Letters Patent Appeal No. 39 of 1925, Decided on 26th May 1926, from a judgment of Kulwant Sahay, J., D/- 24th March 1925.

(*a*) *Practice — Findings — Finding of lower Court unsatisfactory—Proper way is to send the case back—Judgment in favour of opposite party should not be passed.*

The proper way to deal with a case, if the appellate Court considers the findings of the lower Court to be unsatisfactory, is not to enter judgment for the opposite party but to send the case back for a proper finding upon the question on which it was thought the judgment was unsatisfactory.

(*b*) *Ejectment—Suit for—Plaintiff must prove title and possession within* 12 *years.*

It is for the plaintiffs in a case of ejectment to prove not merely their title but further their possession within 12 years.

Simple point.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 & 81.

A. I. R. 1926 Journal 161 (2)

(*Calcutta*)

GREAVES AND PANTON, JJ.

Abdul Rahman Haji Hossein—Decree-holder—Appellant.

v.

Gourhari Ghose — Judgment-debtor—Respondent.

Appeal No. 316 of 1924, Decided on 4th January 1926, from an order of the Addl. Dist. J., Howrah, D/- 8th August 1924.

Execution of decree—Executing Court is not entitled to go into the question of judgment-debtor's minority.

It is not open to the Executing Court to go behind the decree and decide any question of minority of the judgment-debtor. The proper Court to deal with any question of this kind is the Court who passed the decree: 44 *Cal.* 627, *followed.*

Follows I. L. R. 44 *Cal.* 627.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 & 81.

A. I. R. 1926 Journal 161 (3)

(*Oudh*)

ASHWORTH, A. J. C.

Naresh Pratab Singh—Applicant.

v.

Sitla Prashad Tewari and *others* — Opposite Party.

Civil Revision No. 40 of 1925, Decided on 22nd October 1925, against the order of the Munsif, Havali, Fyzabad, D/- 23rd September 1924.

Civil P. C., S. 115—*Order under O.* 47, *R.* 1 *is not revisable.*

Where an appeal is the proper course, revision should not be entertained against an order refusing a review.

Covered by the section.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 & 81.

A. I. R. 1926 Journal 161 (4)

(*Patna*)

DAWSON-MILLER, C. J., AND FOSTER, J.

Mt. Dharichna Kuar and *others*—Defendants—Appellants.

v.

Keshava Prasad Singh and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 322 of 1924, Decided on 13th July 1926, from a decree of the Dist. J., Shahabad, D/- 19th November 1923.

(*a*) *Limitation Act, Arts.* 144 *and* 142—*Applicability.*

In a suit for ejectment where the plaintiff does not set up dispossession, Art. 144 is applicable and not Art. 142.

(*b*) *Limitation Act, Art.* 144—*Burden of proof —Evidence Act, Ss.* 101 *to* 103.

Where in a case under Art. 144 plaintiff's title is proved, the burden of proving adverse possession is on the defendant.

Common points: See:

for (*a*) *A. I. R.* 1925 *Nag.* 370; 14 *N. L. R.* 82; 16 *Cal.* 473 (*P. C.*); 39 *Bom.* 335; *A. I. R.* 1922 *Cal.* 557; 1923 *Nag.* 2.

for (*b*) *A. I. R.* 1924 *Cal.* 977; 1923 *Cal.* 82; 1923 *Nag.* 2; 39 *Mad.* 617 (*P. C.*); 41 *All.* 669; *A. I. R.* 1925 *Oudh* 42.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 & 81.

A. I. R. 1926 Journal 162 (1)

(*Allahabad*)

MEARS, C. J., AND KING, J.

Mahmud Hasan and *others*— Defendants—Appellants.

v.

Lauti Ram and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 325 of 1924, Decided on 1st July 1926, from a decree of the Dist. J., Saharanpur, D/- 16th May 1923.

Civil P. C., O. 41, Rr. 22 and 33—Appellate Court can give relief to respondent although no cross-objection is filed.

The object of R. 33 is manifestly to enable the Court to do complete justice between the parties to the appeal. Where, for example, it is essential in order to grant relief to an appellant that some relief should at the same time be granted to the respondent also, the Court may grant relief to the respondent, although he has not filed an appeal or preferred an objection; 34 *All.* 32, *Foll.*

Simply follows 34 *All.* 32; *also R.* 33, *O.* 41, *Civil P. C., is clear.*

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 162 (2)

(*Bombay*)

MACLEOD, C. J., AND COYAJEE, J.

Abheraj Umarkhan Malek—Appellant.

v.

Dolatsingji Surajmalji Desai — Respondent.

First Appeal No. 223 of 1924, Decided on 7th December 1925, from the decree of the 1st Cl. Sub-J., Ahmedabad, in Suit No. 295 of 1921.

Guardians and Wards Act (8 *of* 1890), *S.* 23 *—Sale by Collector, with sanction of superior officer, of ward's property—Sale confirmed by Court—Sale cannot be challenged by ward after attaining majority.*

Where the Collector as guardian obtained the sanction of the Commissioner, his superior officer, to the sale of his ward's property and when his action was challenged in the High Court, an application to remove him was dismissed and the sale was confirmed by the Court, it is quite impossible for the minor after attaining majority to attempt to set aside the transaction.

On facts.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 162 (3)

(*Nagpur*)

FINDLAY, J. C.

Anand—Defendant—Appellant.

v.

Ramchandra—Plaintiff—Respondent.

Misc. Appeal No. 40 of 1925, Decided on 30th January 1926, from the decree of the 1st Cl. 1st Sub.-J., Nagpur, D/- 21st July 1925, in Misc. Judicial Case No. 88 of 1923.

Civil P. C., O. 5, R. 20—Substituted service can be ordered also for any other reason than defendant's avoiding service.

The Court has power to order substituted service not only where it has reason to believe that the defendant is keeping out of the way to avoid service but where it is satisfied that for any other reason the summons cannot be served in the usual way.

Order 5, R. 20 is clear.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 162 (4)

(*Calcutta*)

CUMING AND CHAKRAVARTI, JJ.

Monohar Mukherjee— Plaintiff — Appellant.

v.

Suresh Chandra Mukerjee and *others* —Defendants—Respondents.

Appeal No. 2181 of 1922, Decided on 24th June 1925, from the appellate decree of the Dist. J., Hoogly, D/- 31st May 1922.

(*a*) *Civil P. C., S. 100—Plain words.*

Where the words are perfectly plain and the question is to what property they refer that cannot be conetrued as a question of construction of a document and, therefore, cannot be argued in second appeal.

(*b*) *Will—Construction—A new word should not be unnecessarily imported into the Will.*

It is not permissible to construe a Will by unnecessarily adding a word. A Will recited that certain rooms on the northen and southern side of a building were alloted for the servants of the library and those of the baithakkhana.

Held: that it was not permissible to read the word "respectively" in the sentence and to hold that the northern rooms were intended for the use of the servants of the library and that the southern rooms were set apart for the servants of the owner of the baithakkhana.

Points obvious and simple.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 163 (1)

(Calcutta)

CHAKRAVARTI, J.

Radha Gobinda Dey and *others*—Plaintiffs—Appellants.

v.

Hara Mohan Bakshi and *others*—Defendants—Respondents.

Appeal No. 186 of 1924, Decided on 18th March 1926, from the appellate decree of the Dist. J., Burdwan, D/- 24th September 1923.

Co-sharer—Suit for rent—Separate collection must be proved.

Co-sharer landlords cannot get a decree for rent of their share if they fail to establish that there was a separate collection of their share of rent before.

Common point: See 1925 *Cal.* 197 (1); and 90 *I. C.* 673.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69 73 and 81.

A. I. R. 1926 Journal 163 (2)

(Calcutta)

GREAVES AND DUVAL, JJ.

Midnapur Zemindari Co. Ltd.—Petitioner.

v.

Dayardra Nath Bhowmik and *others*—Opposite Parties.

Civil Rules Nos. S/32 to S/35 of 1923, Decided on 18th August 1925, from the appellate decree No. 2670 of 1917 of the Dist. J., Nadia, in Title Appeal No. 65 of 1916, D/- 10th September 1917.

Court Fees Act, Ss. 6 and 28—Review application with stamps known to be inadequate—Deficiency not made up until long after expiry of limitation and not due to mistake or inadvertence—Application is not within time.

Where the application for review was presented with stamps known to be inadequate and it was not until long after the 90 days had passed within which the application had to be made and long after the additional period allowable under S. 12 of the Limitation Act had elapsed that the application was properly stamped and there was no mistake or inadvertence within the provisions of S. 28.

Held: that the application is not within time: 24 *W. R.* 258 and *A. I. R.* 1924 *Cal.* 924, *Dist.*

Point very simple and covered by Ss. 6, 12 and 28 of the Court-fees Act.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69. 73 and 81.

A. I. R. 1926 Journal 163 (3)

(Allahabad)

SULAIMAN AND BOYS, JJ.

Rajendra Kishor Saran Singh—Plaintiff—Appellant.

v.

Ibrahim Husain and *others*—Defendants—Respondents.

First Appeal No. 31 of 1923, Decided on 11th May 1926, from a decree of the Sub-J., Allahabad.

Pre-emption—Co-sharers entitled to prempt by custom—Custom is not extinguished where whole property comes to be owned by a single joint family.

The rule that where a whole mahal comes to be owned by a single proprietor, the custom must be deemed to have been extinguished, is not applicable to a case where the whole of the mahal comes to be owned by a single joint family consisting of several members.: 39 *All.* 480 and 15 *A. L. J.* 423, *Dist. A. I. R.* 1924 *All.* 371, *Foll.*

Simply follows A. I. R. 1924 *All.* 371.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 163 (4)

(Calcutta)

NOWBOULD AND GRAHAM, JJ.

Ahmad Ali and *another*—Defendants 1 and 3—Appellants.

v.

Malhiul Alam Choudhury—Plaintiff—Respondent

Appeal Nos. 2438 of 1922 and 646 to 649 of 1923, Decided on 22nd June 1925, against the appellate decrees of the 2nd Sub-J., Chittagong, D/- 30th June 1922.

(*a*) *Bengal Land Revenue Sales Act* (11 *of* 1859)—*Auction purchaser at revenue sale is entitled to mesne profits from tenants.*

An auction purchaser at a revenue sale under the Act is entitled to recover mesne profits from tenants when their tenancies are not annulled till the institution of the suit for mesne profits as mesne profits are limited to the amount payable by the tenants as rent: 37 *Cal.* 559, *Foll.*

(*b*) *T. P. Act, S.* 6 (*e*)—*Transfer.*

Section 6 (e) is no bar to the transfer of an estate with the right to rent due to the owner of the estate.

(*a*) *Simply follows* 37 *Cal.* 559.

(*b*) *Covered by section.*

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 164 (1)

(*Calcutta*)

CHATTERJEA AND CUMING, JJ.

Hem Chandra Jelia and *others*—Defendants—Appellants.

v.

Satya Kinkar Sen and *others*—Plaintiffs—Respondents.

Appeal No. 2203 of 1922, Decided on 7th August 1925, from the appellate decree of the Dist. J., Bankura, D/- 25th May 1922.

Lease—Kabuliyat—Construction.

A mourasi mokarrari kabuliyat provided: "You have been pleased to grant me in accordance with my prayer a Permanent Settlement at a jama of 10 maps of sanja paddy, measured with a Rajhati pai of full measure (the price whereof is Rs. 50) and 10 pons of straw (the price whereof is Rs. 2), the total price being Rs. 52 per annum. Accordingly I give in writing this kabuliyat that I shall deliver the said sanja paddy and straw without variation every year. If I make any default in delivering the sanja paddy, then I shall deliver bari (addition) of two salis of paddy for every map every year.

Held: the parties' intention was that only paddy and straw should be paid as rent. It would be inconsistent with their intention to hold that a fixed sum was agreed upon as that would be wholly inadequate value of the paddy at the date of the suit, and, therefore, in default of payment of the paddy and straw mentioned in the kabuliyat the landlord was entitled to their market value at the date on which they should have been paid and not merely to the sum mentioned in the kabuliyat.

Mere construction of lease.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 164 (2)

(*Allahabad*)

SULAIMAN AND MUKERJI, JJ.

Raja Rai and *others*—Defendants—Appellants.

v.

Ram Autar Rai and *others*—Plaintiffs and Defendants—Respondents.

First Appeal No. 41 of 1923, Decided on 1st June 1926, from a decree of the Addl. Sub.- J., Ballia, D/- 14th December 1922.

Co-sharer—Suit for possession — Order by mutation Court is not mutual arrangement as to title.

An order passed by a Mutation Court even on consent cannot be deemed to be the mutual arrangement under which the title to property is finally settled by the parties: 31 *All.* 73 (*P. C.*), *Foll.*

Simply follows 31 *All.* 73 (*P. C.*).

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 164 (3)

(*Madras*)

PHILLIPS AND ODGERS, JJ.

(*Chakkittandil Parkum Illath*) *Chettivankandi Amed*—Appellant.

v.

Mozhuvammal Ammad and *others*—Retpondents.

Second Appeal No. 104 of 1923, Deeided on 15th December 1925, from the decree of the Dist. J., North Malabar, in Appeal Suit No. 331 of 1921.

Civil P. C., S. 2 (11)—Legal representatives.

Heirs of deceased mortgagor whose equity of redemption has already been sold are not his legal representatives relating to that property but the proper representatives are the purchasers of the equity of redemption: 33 *Mad.* 6; 14 *M. I. A.* 605 and 29 *M. L. J.* 698, *Dist.*

Simple point.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 44, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 164 (4)

(*Nagpur*)

KINKHEDE, A. J. C.

Isram—Applicant.

v.

Gangia—Non-Applicant.

Civil Revision No. 198-B of 1923, Decided on 22nd February 1924, against an order of the Small Cause Court Judge, Akola, D/- 28th July, 1923, in Misc. Case No. 333 of 1922.

Civil P. C., O. 9, R. 13—Plea of Limitation barring application under R. 13—Proof of knowledge of decree is necessary.

In order to support the plea of limitation barring an application for setting aside an exparte decree proof of knowledge of the particular decree with all its contents and the general effect thereof is necessary: 38 *Cal.* 394; 11 *Bom. L. R.* 96 and 9 *N. L. R.* 35, *Foll.*

Simply follows 38 *Cal.* 394 and 9 *N. L. R.* 35.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 165 (1)

(Calcutta)

CUMING AND CHAKRAVARTI, JJ.

Birendra Nath Roy—Plaintiff—Appellant.

v.

Anadi Prasanna Dutta—Defendant—Respondent.

Appeal No. 23 of 1923, Dicided on 29th June 1925, from the appellate decree of the Sub-J., Pabna, D/- 18th July 1922.

Evidence Act, S. 106—Decree against executor impeached on the ground that he had ceased to represent estate before suit—Party impeaching decree must prove his allegations.

Where a decree passed against the executor of the estate is impeached on the ground that the executor had ceased to represent the estate before the suit in which the decree was passed, onus lies on the party impeachihg the decree to prove the allegation.

Too simple a point.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 165 (2)

(Madras)

ODGERS, J.

C. R. Duraiswami Pillai—Plaintiff—Appellant.

v.

Chellaperuma Mudaliar and *others*—Defendants 1 and 3 to 9—Respondents.

Second Appeal No. 1011 of 1923, Decided on 21st January 1926, from the decree of the Dist. J., Chingleput, in A. S. No. 175 of 1922.

Transfer of Property Act, S. 59—Question of proper attestation is one of mixed fact and law and cannot be raised in appellate Court for the first time.

The objection that a mortgage bond was not validly attested could not be allowed to be taken for the first time in the appellate Court as it raises a question of law and fact.

The point about the proper attestation of a deed cannot be said to be raised merely from the fact that the attestors were cross-examined when it is not raised in the pleadings or in the issue or in the argument before the Court: *A. I. R.* 1924 *Mad.* 513, *Foll.*

Simply follows A. I. R. 1924 *Mad.* 513.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 165 (3)

(Madras)

REILLY, J.

Yoodara Sobhandri—Defendant—Petitioner

v.

Challagula Venkanna—Plaintiff—Respondent.

Civil Revision No. 412 of 1923, Decided on 29th July 1925, from a decree of the Sub-J., Kistna, at Masulipatam, in S. C. S. No. 296 of 1922.

Limitation Act, S. 20—Payment of interest—Effect.

Where interest is paid by duly authorized agent of the debtor within his authority before the prescribed period, fresh limitation starts.

On facts. Section clear.

See also Law Reporting Rules: *A. I. R.* 1926, *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 165 (4)

(Allahabad)

KANHAIYA LAL AND ASHWORTH, JJ.

Tula Ram and *another*—Plaintiffs—Appellants.

v.

Bhola Singh and *others*—Defendants—Respondents.

Second Appeal No. 1018 of 1923, Decided on 26th March 1926, from a decree of the Dist. J., Agra, D/- 29th March 1923.

Hindu Law—Joint family—Presumption is that family continued joint until contrary is proved—Definition of shares in revenue papers is not sufficient indication of separation.

In a joint Hindu family, the presumption is, until the contrary is proved, that the family continues joint. That presumption is peculiarly strong in the case of the sons of one father and gets weaker as the branches multiply.

A definition of shares in revenue and village papers affords, by itself, but a very slight indication of an actual separation in a Hindu family, and certainly in no case it can be regarded, standing alone, as sufficient evidence upon which to find, contrary to the presumption in law as to jointness, that the family to which such a definition referred had separated: *A. I. R.* 1925 *P. C.* 132, *Foll.*

Simply follows A. I. R. 1925 *P. C.* 132.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 166 (1)

(Calcutta)

GREAVES AND B. B. GHOSE, JJ.

Mahammed Wasel Ali and *another*—Plaintiffs—Appellants.

v.

Nainuddin Mandal and *others*—Defendants—Respondents.

Appeals Nos. 1212 and 1213 of 1923, Decided on 8th June 1925, from the appellate decrees of the Sub-J., 4th Court, Mymensingh, D/- 21st December 1922.

Co-sharers—Adverse possession—Ouster must be proved.

In order to bar the title of any of the co-sharers by reason of the exclusive possession of one of them it must be found that there was an ouster. The fact that the plaintiffs have not been able to prove their actual possession although they attempted to do so cannot operate to extinguish their title on the ground of adverse possession by their co-sharers.

Simple point.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 166 (2)

(Allahabad)

LINDSAY AND KANHAIYA LAL, JJ.

Mahadeo Kasaudhan—Defendant—Appellant.

v.

Gaya Din Kasaudhan and *another*—Plaintiffs—Respondents.

Second Appeal No. 1020 of 1923, Decided on 20th April 1926, from a decree of the 2nd Addl. J., Gorakhpur, D/- 8th March 1923.

Hindu Law—Joint family—Owning joint property—Acquisition of property while family is joint—Person alleging that it was separate property must prove it.

Where it is proved that there is a joint family and where it is also proved that that joint family has some joint property, the presumption will arise that all property acquired while the family still remains joint is joint family property and that the onus of proving that any particular item of property alleged to be joint, is in fact separate property, will lie upon the person who asserts it to be so; 33 *All.* 677, *Foll.*

Simply follows 33 *All.* 677.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53 61, 69, 73 and 81.

A. I. R. 1926 Journal 166 (3)

(Madras)

JACKSON, J.

Bavachi—Defendant—Petitioner.

v.

V. K. Kunhi Kannan and *another*—Plaintiffs—Respondents.

Civil Revision No. 388 of 1923, Decided on 8th October 1924, from a decree of the Sub-J., Tellicherry, in A. S. No. 266 of 1921.

Contract Act, S. 65—Party deprived of satisfaction to his claim can have fresh cause of action—Right of suit.

Where a party has been deprived of the satisfaction which he had originally obtained, a fresh cause of action accrues when the act agreed upon becomes impossible: 43 *Mad.* 845, *Foll.*

Simply follows 43 *Mad.* 845.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 166 (4)

(Patna)

BUCKNILL AND ROSS, JJ.

Hemat Ram and *others*—Defendants—Appellants.

v.

Karu Sahu—Plaintiff—Respondent.

Appeal No. 584 of 1923, Decided on 18th May 1926, from the appellate decree of the Sub-J., Ranchi, D/- 13th March 1923.

(a) *Chota Nagpur Tenancy Act, S. 39—Case involving question of title does not fall within the section.*

Section 139 does not contemplate a case where there is a dispute with regard to title; and where the relationship of landlord and tenant is not admitted, a suit for possession of an occupency holding on the ground of the defendants' denial of the tenancy right is not cognizable by the Deputy Commissioner: *A. I. R.* 1926 *Patna* 64, *Foll.*

(b) *Adverse possession—Throwing of rubbish is not sufficient user (obiter).*

Obiter.—Much more substantial user than the mere throwing of rubbish on to a piece of land must be proved in order to establish any sort of title by adverse possession: 16 *Bom.* 338, *Foll.*

(a) *Follows A. I. R.* 1926 *Patna* 64.

(b) *Common point*: *A. I R.* 1923 *Lah.* 25; 117 *P. L. R.* 1917 *A I. R.* 1923 *All.* 399; *A. I. R.* 1923 *All.* 557; 13 *N. L. R.* 25; 4 *O. L. J.* 354.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 167 (1)

(Madras)

VISWANATHA SASTRI, J.

Velliammi Ammal— Plaintiff — Petitioner.

v.

Malaiammai Ammal and *another*—Defendants—Respondents.

Civil Revision No. 600 of 1923, Decided on 1st July 1925, from the order of the Dist. J., Tinnevelly, D/- 30th December 1922, in C. M. A. No. 27 of 1922.

Civil P. C., O. 9, R. 9—Restoration of suit —Sufficient cause.

Where plaintiff was a female and it was her case that her husband was in Court with her witnesses on the day in question ; that her vakil was actually engaged in another Court, that when the case was called on at 4 p. m., her husband went to call the vakil, and that the suit was dismissed.

Held : that the plaintiff had done all that lay in her power to have the case proceeded with and the suit should be restored.

Simple point ; based on facts only.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 167 (2)

(Patna)

ADAMI AND DAS, JJ.

Ghura Rai and *others*—Defendants—Appellants.

v.

Harihar Prasad Sinha and *others*—Plaintiffs—Respondents.

Appeal No. 1355 of 1923, Decided on 2nd June 1926, from the appellate decree of the Sub-J., Shahabad, D/- 6th August 1923.

Limitation Act, Art. 142—Suit for ejectment— Plaintiff must show that he was in possession within 12 years of suit.

In a suit for ejectment on the allegation that plaintiff was dispossessed by defendant, it is incumbent upon the plaintiff to prove that he had been in possession of the land within 12 years of the suit : 5 *P. L. J.* 592, *Expl.*

Common point : See *A. I. R.* 1923 *All.* 418 ; 1923 *Cal.* 286 ; 1922 *Cal.* 557 ; 43 *I. A.* 192 ; 39 *Mad.* 617 (*P.C.*) ; 62 *I. C.* 607 ; 89 *I. C.* 687 ; *A. I. R.* 1925 *Lah.* 47 ; 1924 *Pat.* 341 ;

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 167 (3)

(Calcutta)

SUHRAWARDY AND MUKERJI, JJ.

Manmatha Nath Kar—Defendant—Appellant.

v.

Probodh Chandra Ratori—Plaintiff—Respondent.

Appeal No. 1336 of 1923, Decided on 3rd December 1925, from the appellate decree of the 2nd Sub-J., Midnapore, D/- 15th January 1923.

Evidence—Admissibility — Objection as to inadmissibility not raised in first Court—Objection cannot be raised in appeal—But omission to object does not make inadmissible evidence admissible.

Where evidence is admitted in the first Court without any objection being taken to its reception and the evidence is admissible as relevant no party will be allowed to object to the reception of such evidence at any later stage of the litigation : *A. I. R.* 1925 *Cal.* 1034 and 19 *All.* 76 (*P. C.*), *Foll.* But an omission to take objection to the reception of a document which is irrelevant or inadmissible in evidence in the case does not make it admissible : 19 *All.* 76 (*P.C.*), *Foll.*

Simply follows : *A. I. R.* 1925 *Cal.* 1034 and 19 *All.* 76 (*P. C.*).

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 167 (4)

(Madras)

DEVADOSS, J.

Ramaswami Chettiar—1st Defendant —Appellant.

v.

Kathamuthu Thevar and *another* — Plaintiff and 2nd Defendant—Respondents.

Second Appeal No. 1310 of 1923, Decided on 12th March 1926, from the decree of the Dist. J., West Tanjore, in A. S. No. 147 of 1922.

T. P. Act, S. 53—Partition of joint Hindu family is transfer.

A partition among the members of a joint Hindu family is a transfer to which the provisions of S. 53 of the Transfer of Property Act would be applicable : *A. I. R.* 1923 *Mad.* 577, *Foll.*

Simply follows : *A. I. R.* 1923 *Mad.* 577.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 168 (1)

(Calcutta)

CUMING, J.

Mt. Rakhya Mani Debi—Plaintiff—Appellant.

v.

Paramesh Chakrabarti—Defendant—Respondent.

Appeal No. 1472 of 1923, Decided on 23rd April 1925, from the Appellate Decree of the 1st Sub-J., Hooghly, D/- 5th January 1923.

Lease—Construction—Lease for enjoyment of fruits and planting new trees—Lessee incompetent to cut down or sell without lessor's permission—Lease is for horticultural purposes.

Where the lessee is allowed, according to the lease, to enjoy the fruits of the trees on the land and is also allowed to plant and grow more fruit trees, and to enjoy the fruit thereof, but is not allowed to cut down or sell the trees, without the lessor's permission, the tenancy is for horticultural purposes : 17 *C. L. J.* 411, *Dist.*

The decision is on the facts of the case.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 168 (2)

(Allahabad)

DANIELS AND KING, JJ.

Deo Nandan Singh and *another*—Defendants—Appellants.

v.

Har Shanker Prasad Shukul and *another*—Plaintiffs—Respondents.

Second Appeal No. 1419 of 1923, Decided on 12th May 1926, from a decree of the Dist. J., Benares.

Agra Tenancy Act (2 *of* 1901), *S.* 177 (*f*)—*Plea of jurisdiction must be based on facts as alleged in the plaint.*

A plea of jurisdiction to come within the provisions of S. 177 (f), must be a plea to the effect that, assuming the allegations made in the plaint to be true, the revenue Court has no jurisdiction. If the defendant alleges that the true facts are different from those stated in the plaint, and that on the facts alleged by himself, the case is not cognizable by the revenue Court, this is not a plea to wnich S. 177 (f) applies : 42 *All.* 91, *Foll.*

Simply follows 42 *All.* 91.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 168 (3)

(Nagpur)

FINDLAY, OFFG. J. C.

Naktu and *another*—Defendants—Appellants.

v.

Ramchandra Bapu—Plaintiff—Respondent.

Second Appeal No. 457 of 1923, Decided on 6th August 1925, from the decree of the Dist. J., Bhandara, D/- 28th July 1923, in Civil Appeal No. 14 of 1923.

C. P. Land Revenue Act (1917), *Ss.* 107, 108 *and* 220—*Plea challenging lease and kabuliyat is barred.*

Anyone, who is entitled to the benefits of a protected thekadar, is equally bound to perform the duties prescribed by the law for such a thekadar. Therefore, the thekadar is not entitled to question the conditions laid down in the lease and kabuliyat : 10 *Nag.* 64, *Foll.*

Simply follows 10 *N. L. R.* 64.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 168 (4)

(Madras)

PHILLIPS, J.

Subbain Goundan—7th Defendant—Petitioner.

v.

Sennimalai Goundan and *another*—Plaintiff and 9th Defendant—Respondents.

Civil Revision No. 703 of 1923, Decided on 28th August 1925, from the order of the Sub-J., Coimbatore, D/- 3rd March 1923.

Jurisdiction—Consent.

No consent of parties could give the Court jurisdiction.

Common point : See *A. I. R.* 1925 *P. C.* 125 ; 1925 *Cal.* 812 ; 42 *Cal.* 116 (*P. C.*) *A. I. R.* 1924 *Mad.* 406 ; 34 *Bom.* 171 ; *A. I. R.* 1923 *Mad.* 497 ; 33 *Bom.* 664 ; 45 *Cal.* 519.

See also Law Roporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journa 169 (1)

(*Calcutta*)

WALMSLEY AND MUKERJI, JJ.

Shib Chandra Banerjee—Plaintiff—Appellant.

v.

Umesh Nath Roy and *others*—Defendants—Respondents.

Appeals Nos. 779 and 780 of 1923, Decided on 4th December 1925, from the appellate decree of the Addl. Sub-J., Burdwan, D/- 27th October 1922.

Bengal Village Chaukidari Act (1870), *S.* 61—"*final and conclusive*" *refer to revenue as well as civil Court.*

When there is compliance with the provisions of S. 61, the propriety of the order cannot be questioned in the civil Court. The words "final and conclusive" must be taken in their ordinary and literal sense. The finality is not restricted to revenue Courts alone : 11 *Cal.* 632 and 2 *C. L. J.* 302, *Foll.* ; 2 *C. L. J.* 306, *not Foll.*

Simply follows 11 *Cal.* 632.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 169 (2)

(*Calcutta*)

GREAVES AND B. B. GHOSE, JJ.

Bingshi Badan Haldar—Plaintiff—Appellants.

v.

Ratan Ijardar and *others*—Defendants—Respondents.

Appeal No. 1538 of 1923, Decided on 8th July 1925, from the decree of the Addl. Dist. J., Khulna, D/- 22nd December 1922.

(*a*) *Landlord and tenant—Ejectment—Onus of proving permanent right is on tenant.*

In a suit for ejectment if the tenants claim any permanent right it is for them to substantiate it.

(*b*) *Bengal Tenancy Act* (8 *of* 1885), *S.* 49—*Ejectment.*

By a notice under S. 49 a landlord can eject a tenant holding under a lease for an indefinite poriod : 39 *Cal.* 278, *Foll.*

(*a*) *Simple point* : vide *Evidence Act*, S. 101.

(*b*) *Follows* 39 *Cal.* 278.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 169 (3)

(*Calcutta*)

CUMING AND CHAKRAVARTI, JJ.

Durga Prosad Lahiri others—Defendants—Appellants.

v.

Ratan Mahommed Sarkar and *others*—Plaintiffs—Respondents.

Appeals Nos. 48 and 49 of 1924, Decided on 24th June 1925, from the order of the Sub-J., Dinajpur, D/- 19th June 1923.

Bengal Tenancy Act, Sch. 3 *Art.* 3—*Plaintiff dispossessed by purchser from landlord—Art.* 3 *does not apply.*

Where it was found that the defendant had purchased the land and dispossessed the plaintiff as such purchaser and not as an agent of the landlord.

Held : that the plaintiff's dispossession was not by the landlord, nor was it on his behalf, and therefore plaintiff's suit to recover possession is not barred by Act, 3.

Based on fact.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 169 (4)

(*Madras*)

DAVADOSS AND WALLACE, JJ.

(*Vengala*) *Venkata Rao* and *others*—Plaintiffs—Appellants.

v.

Papayya and *others* — Defendants—Respondents.

Second Appeal No. 1261 of 1922, Decided on 19th August 1926, from the decree of the Sub-J., Rajahmundry, in Appeal Suit No. 65 of 1922.

Hindu Law—Religious endowment—Grant—Inam.

The fact that the alienation of a Swasthivachakam inam is in favour of a member of the family does not validate the transfer : 6 *Mad.* 76 ; 38 *Mad.* 850 and *A. I. R.* 1922 *Mad.* 197, *Foll.*

Simply follows 6 *Mad.* 76 ; 38 *Mad.* 850 and *A. I. R.* 1922 *Mad.* 197.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61 69, 73 and 81.

A. I. R. 1926 Journal 172 1)

(*Allahabad*)

DANIELS, J.

Ajodhia Nath Ojha—Plaintiff— Appellant.

v.

Bisheshar—Defendant—Respondent.

Second Appeal No. 1802 of 1923, Decided on 3rd May 1926, from a decree of the 2nd Addl. J., Gorakhpur, D/- 4th May 1923.

Wajib-ul-arz—Construction—Grove-holder has right to fallen trees.

A wajib-ul-arz provided that a tenant has no power to sell and cut a tree without the permission of the owner of the soil,

Held : that the phrase " cut and sell" was not intended to interfere with the custom that fallen trees belong to grove-holder : 21 *All.* 297 *Dist.*

The question is of mere construction.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 172 (2)

(*Calcutta*)

SUHRAWARDY AND MUKERJI, JJ.

Asiwr Rahman—Defendant No. 13—Appellant.

v.

Asgar Ali—Plaintiff—Respondent.

Appeal No. 2055 of 1923, Decided on 17th December 1925, from the appellate decree of the Addl. Dist. J., Chittagong, D/- 2nd May 1923.

Bengal Revenue Sales Act (11 *of* 1859), *S.* 53—*Incumbrance created by defaulting proprietor is binding on benamidar purchaser for him.*

The purchaser who is the benamidar for the defaulting proprietor is only entitled to take the property subject to the encumbrance created by the defaulting proprietors. 16 *W. R.* 130 ; 16 *W. R.* 138; and 22 *C. W. N.* 505 (*P. C.*), *Foll.*

Simply follows 22 *C. W. N.* 505 (*P. C.*).

See also Law Reporting Rules ; *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 172 (3)

(*Allahabad*)

DALAL, J.

Sohanal—Defendant—Appellant.

v.

Makhan Lal—Plaintiff—Respondent.

Second Appeal No. 1473 of 1923, Decided on 23rd February 1926, from a decree of the Dist. J., Agra, D/- 1st August 1923.

Landlord and tenant—Ex-proprietary tenant is a tenant of whole proprietary body.

An ex-proprietary tenant is not a tenant of the one particular proprietor who purchases the sir land but is a tenant of the whole proprietary body : 35 *All.* 27 (*F.B.*) *Foll.*

Simply follows 35 *All.* 27 (*F. B.*).

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 172 (4)

(*Madras*)

KRISHNAN AND VENKATASUBBARAO, JJ.

Balliboyana Yerramma and *others*—Defendants 2, 3, 7, 8 9 and 6—Appellants.

v.

Jakkannagari Ramappa and *others*—— Plaintiffs and Defendants 4 and 5 — Respondents.

Appeals Nos. 426 and 427 of 1924, Decided on 1st April 1926, from the decree of the Dist. J., Anantapur, D/- 22nd February 1924, in Original Suit No. 12 of 1920.

(a) Deed—Construction — Sale deed — Test is whether parties intended present conveyance.

For determining whether a document is a deed of sale or only an agreement to sell, the test is whether, according to the intention of the parties as expressed in the instrument there is a present conveyance of the property or only an agreement to create a further right. This intention has to be gathered from the language of the document as well as from the surrounding circumstances : 37 *Mad.* 480, *Foll.*

(b) Deed—Construction—Sale deed or agreement to sell.

Where the document was written upon ordinary plain paper bearing only an adhesive stamp of one anna on it, and the document was headed as *Boomi Vikraya Dasthaveju* and contained a statement that the properties are given this day for sale for . . . . and we have this day taken an earnest of Rs. 200, and itfurther stated : " We shall take out remaining amount in full and get registered at Kalyandrug."

Held : that the document amounted only to an agreement to sell and was not a sale deed.

Point (a) simply follows 37 *Mad.* 480 and *Point (b) is only a construction of deed.*

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 173 (1)

(Madras)

CURGENVEN, J.

Misrikhan Khaleel—Plaintiff—Appellant.

v.

District Board, Kurnool—Defendant—Respondent.

Second Appeal No. 147 of 1924, Decided on 10th August 1926, from the decree of the Sub-J., Kurnool, in Appeal Suit No. 26 of 1923.

(*a*) *Madras Local Boards Act* (5 *of* 1884), *S.* 89 (1)—*Leasing out toll-gates—Contract by president without sanction—Board is not bound.*

A contract to lease out toll-gates by the president without the sanction of the District Board is not binding on the Board as the sanction is not a mere formality.

(*b*) *Madras Local Boards Act, S.* 33 (*a*) — *Toll-gate.*

The opening of a toll-gate is neither necessary for the safety nor the service of the public within S. 33 (a).

(*a*) *Is covered by S.* 89 (1) and (*b*) *is simple point.*

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 173 (2)

(Allahabad)

XANHAIYA LAL AND ASHWORTH, J.

Gopal Bhagat—Defendant—Appellant.

v.

Raghubir Ram and *others*—Plaintiffs—Respondents.

Second Appeal No. 221 of 1924, Decided on 18th June 1926, from a decree of the Dist. J., Ghazipur, D/- 1st November 1923.

Hindu Law—Joint family—Debt borrowed by manager for family business, carried on bona fide for family benefit — Lender need not enquire into the necessity every time money is lent.

Where a family business is carried on bona fide for the benefit of the family and with the assent of all the adult members it is within the competence of the manager to borrow money from time to time for the purposes of the business and the lender is not bound to enquire into the necessity for each advance that may be made : *A. I. R.* 1924 *All.* 379, *Foll.*

Simply follows A. I. R. 1924 *All.* 379.

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 173 (3)

(Calcutta)

CHATTERJEA AND PAGE, JJ.

Secretary of State for India—Defendant 1—Appellant.

v.

Purna Chandra Mukherjee and *others*—Plaintiffs—Respondents.

Appeal No. 221 of 1924, Decided on 8th July 1926, from the original decree of the Sub-J., Nadia, D/- 10th July 1924.

(*a*) *Mesne profits—Decree for—Application for assessment of—Question of liability cannot be gone into.*

Where a decree is passed for mesne profits, on an application for the assessment of the profits, it is not open to the defendant to raise a question of his liability to pay the profits.

(*b*) *Mesne profits—Ascertainment of—Defendant in possession of land letting out on cash rent,*

On application for ascertainment of mesne profits.

Held : on the consideration of circumstances, mesne profits should be assessed on the produce basis. Although the defendant was letting out on cash rents, what the defendant might with ordinary diligence have received from the land, must be considered.

(*a*) *Is a simple point.*

(*b*) *Is on facts.*

See also Law Reporting Rules : *A.I.R* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 173 (4)

(Allahabad)

LINDSAY AND SULAIMAN, JJ.

Ram Bharos and *another*—Plaintiffs—Appellants.

v.

Sumeshar Pandey and *others*—Defendants—Respondents.

Second Appeal No. 834 of 1924, Decided on 27th October 1926, from a decree of the Sub-J., Basti, D/- 5th January 1925.

Agra Pre-emption Act, S. 12 (3)—*Vendee resisting claim for pre-emption as having better or equal right with plaintiff—S.* 12 (3) *applies.*

A vendee who is resisting a claim for pre-emption on the ground that he has as good a right as, or a better right of pre-emption than, that of the plaintiff is claiming pre-emption within S. 12 (3) : *A. I. R.* 1925 *All.* 542 and *A. I. R.* 1925 *All.* 747, *Foll.*

Simply follows A. I. R. 1925 *All.* 542 and 747.

See also Law Reporting Ruies : *A.I.R.* 1926 *Journal*, pp. 33, 41, 55, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 174 (1)

(*Allahabad*)

DALAL AND PULLAN, JJ.

Bhagwant Bharti—Defendant—Appellant.

v.

Rajpat Kurmi and *others* — Plaintiff and Defendants—Respondents.

Second Appeal No. 382 of 1924, Decided on 21st October 1926, from a decree of the Dist. J., Ghazipur, D/- 4th December 1923.

Hindu Law—Alienation by widow—Sum not required for legal necessity being comparatively small—Sale should be upheld—No rule exists as to particular proportion when sale is to be upheld.

Where in a suit by a reversioner to set aside a sale by a widow, the sum not required for legal necessity is very small as compared with the rest of the consideration the sale should be upheld. There is no rule that an alienation can be confirmed only when more than any particular arithmetical proportion of consideration is supported by legal necessity : *A. I. R.* 1925 *All.* 624 (*F. B.*), *Rel. on* ; *A. I. R.* 1925 *All.* 324, *Ref.*

Common point : See *A. I. R.* 1925 *All.* 324 (2) ; *A. I. R.* 1924 *Bom.* 176 ; *A. I. R.* 1923 *Lah.* 268 ; *A. I. R.* 1922 *Lah.* 327 ; *A. I. R.* 1923 *Nag.* 125 ; 41 *All.* 338.

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 174 (2)

(*Patna*)

DAS AND ROSS, JJ.

Shamdutt Singh and *others*—Plaintiffs—Appellants.

v.

Gajadhar Prasad and *others*—Defendants—Respondents.

Second Appeals Nos. 1208, 1246 and 1043 of 1924, Decided on 21st June 1926, from a decision of the Addl. Dist. J., Patna, D/- 25th June 1924.

Bengal Tenancy Act, S. 35—Enhancement refused on facts found — High Court will not interfere.

Where the Court has exercised its discretion in refusing to enhance the rent under S. 35, on the facts found, High Court will not interfere in second appeal.

Common point See *A. I. R.* 1925 *Cal.* 711 ; 1924 *Lah.* 629 ; 1922 *Pat.* 47.

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 51, 69, 73 and 81.

A. I. R. 1926 Journal 174 (3)

(*Allahabad*)

KANHAIYA LAL AND ASHWORTH, JJ.

Shujaul Hasan Khan and *others*—Defendants—Appellants.

v.

Muhammad Mojiz Husain and *others*—Plaintiffs—Respondents.

Second Appeals Nos. 1573 and 1682 of 1924, Decided on 7th July 1926, from a decree of the Sub-J., Moradabad, D/- 1st September 1924.

Transfer of Property Act, S. 6 (a)—Life interest in A—B to get full proprietary right after A's death—B gets vested remainder which he can transfer.

When there was a dispute about the properties of a Muhammadan who died leaving certain heirs A and B and the dispute being referred to arbitration, an award was made whereby A got the properties for life without right of alienation and after his death the properties were to pass to B in full proprietary right with right of transfer etc.

Held : that B took a vested remainder which he or his heirs were competent to transfer during A's lifetime.

Point involves a question about construction of a particular document only.

See also Law Reporting rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 174 (4)

(*Oudh*)

STUART, C. J., AND GOKARAN NATH MISRA, J.

Prag Narain and *others*—Plaintiffs—Appellants.

v.

Kali Charan and *others*—Defendants—Respondents.

Second Appeal No. 38 of 1925, Decided on 15th November 1926, from the decree of the Addl. Sub-J., Hardoi, D/- 13th December 1924.

Civil P. C., S. 100—Finding of fact even grossly erroneous cannot be interfered with.

There is no jurisdiction to entertain a second appeal on tho ground of an erroneous finding of fact however gross or inexcusable the error may seem to be : 17 *I. A.* 122, *Foll.*

Common point : See *A. I. R.* 1925 *Lah.* 150 ; 1925 *Mad* 823 ; 1924 *Pat.* 591 ; 24 *C.W.N.* 201 (*P. C.*) ; 43 *Cal.* 1104 (*P. C.*).

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 175 (1)

(*Madras*)

JACKSON, J.

Krishnammal—Plaintiff—Petitioner.

v.

Paruvathan Chetty—Defendant—Respondent.

Civil Revision No. 1086 of 1924, Decided on 12th August 1926, from the decree of Dist. Munsif, Udamalpet, in Original Suit No. 1017 of 1922.

Civil P. C., O. 10, *R.* 4—*Suit for rent—Plea of discharge—Defendant willing to withdraw plea on condition of plaintiff's deposing to the contrary—Procedure is to record evidence of discharge and draw inferenee as to refusal of plaintiff—Court could not act under R.* 4 *but under O.* 3, *R.* 1.

In a suit for rent, defendant pleaded discharge but was prepared to withdraw that plea if plaintiff would herself depose that there was no discharge. Plaintiff declined to come to Court for that purpose. Court ordered her appearance under O. 10, R. 4 and as she did not appear dismissed the suit.

Held : that the proper procedure would have been to take defendant's evidence of discharge and to have drawn the natural inference from plaintiff's refusal to appeal, but that the Court had no reason to summon the plaintiff under O. 10, R. 4, but could summon her under O. 3, R. 1.

Based on facts.

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 50, 61, 69. 73 and 81.

A. I. R. 1926 Journal 175 (2)

(*Oudh*)

STUART, C. J., AND HASAN, J.

Mt. Ram Kunwar and *others*—Appellants.

v.

Badri Singh and *others*—Respondents.

Second Appeal No. 386 of 1925, Decided on 27th October 1926, from the decree of the Dist. J., Hardoi, D/- 27th April 1925.

Civil P. C., O. 22, *R.* 9—*Suit by holder of female's estate—Any one of the reversioners can continue the suit on her death for benefit of all —Hindu Law—Reversioner.*

In a case in which more than one reversioner has a right to succeed to the estate of a Hindu upon the death of limited owner any one of such persons represents the entire body of reversioners for the purpose of continuing a suit commenced by the holder of the female's estate : 16 *O. C.* 194 (*P. C.*), *Foll.*

Simply follows 16 *O. C.* 194 (*P. C.*)

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 175 (3)

(*Oudh*)

STUART, C. J., AND RAZA, J.

Lahchman Prasad—Plaintiff—Appellant.

v.

Mohammad Ali Mohammad Khan and *others*—Defendants—Respondents.

First Appeal No. 53 of 1925, Decided on 25th October 1926, from the decree of the 2nd Addl. Sub-J., Lucknow, D/- 30th May 1925.

(*a*) *Mortgage—Undivided share mortgaged—Lands going to mortgagor's share liable.*

The rights of a mortgagee of an undivided share in land can be enforced against lands which under a partition have been allotted in lieu of such share whether lands be in the possession of the mortgagor or one who has purchased his right, title and interest : 1 *I. A.* 106 (*P. C.*), *Foll.*

(*b*) *Transfer of Properiy Act, S.* 52—*Neither party can alienate so as to affect rights of the other.*

The correct mode of stating the doctrine is that pendente lite neither party to the litigation can alienate the property in dispute so as to affect his opponent : 29 *All.* 339 (*P. C.*), *Foll.*

(*a*) *Follows* 1 *I. A.* 106 (*P. C.*).

(*b*) *Follows* 29 *All.* 339 (*P. C.*).

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 175 (4)

(*Madras*)

DEVADOSS AND SUNDARAM CHETTY, JJ.

R. Arunagiri Mudaliar—Petitioner.

v.

Official Receiver of North Arcot—Respondent.

Appeal No. 302 of 1925, Decided on 7th September 1926, from the order of the Dist. J., North Arcot, D/- 26th January 1925, in I. P. No. 4 of 1919.

Provincial Insolveney Act (1920), *S.* 37—*Adjudication annulled—Property of proposed insolvent cannot be distributed amongst creditors.*

When the order of adjudication has been annulled the property of the person sought to be adjudicated cannot be distributed by the Official Receiver amongst the creditors. He must keep it in his hands for the benefit of the proposed insolvent.

S. 37 *is clear.*

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41 , 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 176 (1)

(*Calcutta*)

CHATTERJEE, AG. C. J., WALMSLEY AND PAGE, JJ.

Lakhan Chandra Malo—Defendant 1—Appellant.

v.

Gopal Sheikh and *others*—Plaintiffs—Respondents.

Letters Patent Appeal No. 45 of 1925, Decided on 29th January 1926, from the judgment of Greaves, J.

Limitation Act, Art. 142—*Suit for possession and dispossession—Plaintiff must prove his possession within* 12 *years—Ejectment.*

In a suit for ejectment where the plaintiff comes to Court on the allegation of possession and dispossession, he must show that he was in possession within twelve years of the suit.

Common point : See *A. I. R.* 1923 *All.* 418 ; *A. I. R.* 1924 *All.* 920 ; *A.I. R.* 1923 *Cal.* 283 ; *A. I. R.* 1922 *Cal.* 557 ; *A. I. R.* 1925 *Lah.* 47 ; *A. I. R.* 1925 *Nag.* 370 ; *A. I. R.* 1923 *Nag.* 95 ; *A. I. R.* 1925 *Oudh* 42.

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 176 (2)

(*Lahore*)

ABDUL RAOOF, J.

Hashmat Hussain and *others*—Accused.—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 877 of 1924, Decided on 7th January 1925, from an order of the Dist. Mag., Gurgaon, D/- 30th September 1924.

Criminal trial—Complainant making conflicting statements in first information report and in his complaint—First information made after much delay—Delay not explained—Evidence was not believed for indentifying the accused.

Where the complainant made conflicting statements with regard to the number of accused in the first information report and his complaint.

Held ; that his evidence with regard to the indentification of the accused persons could not be believed specially when the first information report was lodged with much delay and the delay was not explained.

Simply on facts.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 176 (3)

(*Lahore*)

HARRISON, J.

Mt. Prag Devi and *another*—Objectors—Appellants.

v.

Nathu Mal and *others*—Petitioners—Respondents.

Misc. Civil Appeal No. 2603 of 1924, Decided on 22nd April 1925, from an order of the Dist J., Jullundur, D/- 25th June 1924.

Will—Construction—Inference that testator possessed a disposing mind at the time of executing will may be drawn from surrounding circumstances.

Where there was no direct evidence as to whether the testator possessed a disposing mind at the time of making a Will, but the testator was in a very weak state of health and was under the influence of persons who were benefited by the Will.

Held : that the Court may infer exercise of undue influence over the testator from these surrounding circumstances and may reject the Will on the ground of having been executed without a disposing mind.

Simply on facts.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 176 (4)

(*Lahore*)

JAI LAL, J.

Faiz—Accused—Appellant.

v.

King-Emperor—Opposite Party.

Criminal Appeal No. 220 of 1926, Decided on 29th March 1926, from the order of the 1st Cl. Mag., D/- 1st February 1926.

Arms Act, Ss. 20 and 19.

Where the circumsrances under which a pistol was recovered from the accused, who had come on a visit to Lahore from his village, led to a clear inference that his intention was that the possession of the pistol by him may not be known to any public servant.

Held : that it was not a case of an ordinary concealment and conviction should be one under S. 20.

Covered by Ss. 19 and 20.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal* pp. 33, 41, 45, 53, 61, 69, 73 & 81.

A. I. R. 1926 Journal 177 (1)

(*Lahore*)

JAI LAL, J.

Jawahar Singh and *others* — Defendants--Appellants.

v.

Sunder Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 1962 of 1925, Decided on 8th October 1926, against the decree of the Addl. Dist. J., Lahore, D/- 29th June 1925.

Civil P. C., S. 100—*Findings of fact cannot be interfered in second appeal.*

Where the lower appellate Court has arrived at a conclusion which is permissible on the facts established it is not open to the High Court to set aside its finding on second appeal even if the second appellate Court is inclined to come to a different conclusion on those facts.

Common point: See *A. I. R.* 1925 *Lah.* 333 (2); 1923 *Lah.* 236 (1); 1923 *Lah.* 11 (2); 1925 *Nag.* 271; 24 *O. C.* 221; *A. I. R.* 1925 *Pat.* 384.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 177 (2)

(*Oudh*)

RAZA, J.

Rampal Singh — Defendant — Appellant.

v.

Shankar Bakhsh Singh—Plaintiff—Respondent.

Second Appeal No. 106 of 1926, Decided on 4th October 1926, from a judgment of the Sub-J., Rae Bareli, D/- 7th January 1926.

Pre-emption — Suit for — Plaintiff alleging sale price to be fictitious must prove it to be so—If he succeeds, Court should determine its market value and plaintiff must pay it.

When the plaintiff in a suit for pre-emption alleges that the price stated in the sale-deed is fictitious and the allegation is denied, the Court has to determine whether the price stated in the deed is fictitious as alleged, and if so, what the fair market value of the property is. If the plaintiff succeeds in showing that the price stated in the sale deed is fictitious, he is not entitled to acquire the property for the price actually paid, but must pay for it a price equivalent to the fair market value: 4 *O. C.* 158 and 6 *O. C.* 327, *Foll.*

Simply follows 4 *O. C.* 158 and 6 *O. C.* 327.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal* pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 177 (3)

(*Oudh*)

STUART, C. J., AND WAZIR HASAN, J.

Rajendra Bahadur Singh and *another*—Defendants—Appellants.

v.

Birjraj Bakhsh Singh and *others* — Plaintiffs—Respondents.

Second Appeal No. 536 of 1925, Decided on 9th November 1926, from the decree of the 1st Addl. Dist. J., Lucknow, D/- 3rd September 1925.

Oudh Rent Act (22 *of* 1886 *as amended*), *S.* 108 (10 *b*)—*Suit by heir of occupancy tenant to recover land against landlord is barred.*

A civil Court has jurisdiction in a suit for recovery of possession of lands held in the right of occupancy tenancy by a person claiming title on the general law of inheritance only when the suit is against a person who is not the landlord: *A. I. R.* 1926 *Oudh* 371 (*F. B.*), *Foll.*

Simply follows *A. I. R.* 1926 *Oudh* 371 (*F. B.*).

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 177 (4)

(*Calcutta*)

RANKIN AND DUVAL, JJ.

Basanta Kumar Gossain and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 293, 356 and 357 of 1926, Decided on 17th August 1926, from the order of the S. J., Dinajpur, D/- 22nd April 1926.

Penal Code, Ss. 366 *and* 107—*Kidnapping and abetment of.*

B having lived at D for some time came back to M where his wife was living and told her that as he had got work at D, she should go with him to D to cook for him. In that way he induced her to leave M for D. When they reached D, they were met by one S and they all went together to the house of a woman K. When B's wife went to the house of K, she was told by K that her husband had sold her to S for Rs. 150 and that S would give her presents and make her happy. S also told her the same thing and asked her to come and live with him. B, S and K were all charged under S. 366.

Held: that the question was not merely whether the jury was satisfied that S made immoral proposal to the woman at D or whether the jury were satisfied that K was a woman who kept a house of a disorderly and disreputable character but the question which the jury had to answer was whether it was shown that

the offence of the husband under S. 366 was abetted by S and K under S. 107; and the only way in which that could be made out was to see whether there was sufficient proof that before the husband left D for M he had a bargain with these people to that effect, that they knew that the girl could not be brought to D except by deceitful means and that, therefore, they abetted the offence under S. 366.

Based on facts.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal* pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 178 (1)

(Oudh)

WAZIR HASAN, J.

Gaya Prasad Singh and *others*—Defendants—Appellants.

v.

Someshwar Nath Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 187 of 1926, Decided on 28th October 1926, from the decree of the Sub-J., Sultanpur, D/- 22nd April 1926.

Co-sharers—One building on joint land—Others' remedy is to seek partition—Court may in proper cases order demolition of property.

Where one co-sharer has built structures on joint land, the other co-sharer's remedy, if any, is to obtain partition, but there may be circumstances in which the Court would permit the demolition of structures: *A. I. R.* 1924 *P. C.* 144, *Foll.*; *A. I. R.* 1926 *Oudh* 412, *Ref.*

Simply follows A. I. R. 1924 *P. C.* 144.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 178 (2)

(Madras)

WALLACE AND MADHAVAN NAIR, JJ.

President, Taluk Board, Ramnad—Plaintiff—Appellant.

v.

Vavaru Ambalam—3rd Defendant—Respondent.

Letters Patent Appeals Nos. 165 and 166 of 1924, Decided on 11th December 1925, from the judgment of Devadoss, J., reported in *A. I. R.* 1925 *Mad.* 620.

Madras Estates Land Act (I of 1908), S. 3 (II) (a)—Ryot utilising rain water falling on his own land is not bound to pay sarasari to landholder.

A ryot who collects and uses for cultivation the rain-water falling on his own holding, by putting ridges all round his holding, is not using the landlord's water and is not bound to pay sarasari to the landlord: *A. I. R.* 1925 *Mad.* 620, *Affirmed.*

Simply affirms A. I. R. 1925 *Mad.* 620.

See also Law Reporting Rules: *A. I. R*, 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 178 (3)

Oudh)

WAZIR HASAN AND RAZA, JJ.

Chandika Singh and *others*—Plaintiffs—Appellants.

v.

Bithal Das and *another*—Defendants—Respondents.

Second Appeals Nos. 509 and 540 of 1925, Decided on 22nd November 1926, from the decree of the 2nd Addl. Sub.-J., Lucknow, D/- 6th July 1925.

(a) *Civil P. C., S.* 100—*Findings of facts based on admissible evidence are not challengeable in second appeal even though erroneous.*

Findings of facts based upon admissible evidence, must be accepted in second appeal, and there is no jurisdiction to entertain a second appeal on the ground of even an erroneous finding of fact, however gross or inexcusable the error may seem to be: 18 *Cal.* 23 (*P. C.*), *Foll.*

(b) *Civil P. C., S.* 100—*Inferences drawn from documentary evidence cannot be questioned in second appeal.*

Where documents which are mere pieces of evidence are considered by the lower appellate Court in determining questions of facts, findings based on constructions of, or inferences drawn from, such documentary evidence cannot be questioned in second appeal: *A. I. R.* 1923 *P. C.* 187, *Foll.*

(a) *Follows* 18 *Cal.* 23 (*P. C.*).

(b) *Follows A. I. R.* 1923 *P. C.* 187.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 179 (1)

(*Lahore*)

SHADI LAL, C. J.

Muhammad Bakhsh — Defendant — Petitioner.

v.

Muhammad Fazil and *others* — Plaintiffs—Respondents.

Miscellaneous Petition No. 284 of 1926, Decided on 26th November 1926, from the decision of S. J., Jullunder, D/- 2nd January 1926.

Practice—Appeal — Two suits having common issue tried together — One appealable to District Judge while the other is to the High Court—Joint trial of both appeals demanded—Procedure.

Where two suits in which the main issue is the same are tried together but appeal from one lies to the High Court but from the other to the District Judge and the appellant wants both the appeals to be heard by the High Court, the right way is to appeal to the District Judge from the decision appealable to that Court and an application for transfer should then be made to the High Court, but if the appellant has failed to adopt this course, it would be a manifest abuse of the process of Court to put the appellant to the unnecessary trouble of going first to the District Court when there is no intention of permitting that Court to take any action beyond registering the appeal ; 101 *P. R.* 1912, *Foll.*

Simply follows 101 *P. R.* 1912.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 179 (2)

(*Oudh*)

STUART, C. J. AND RAZA, J.

Sheo Balak—Accused—Appellant.

v.

King-Emperor—Opposite Party.

Criminal Appeal No. 420 of 1926, Decided on 2nd December 1926, from the order of the S. J., Sitapur, D/- 30th October 1926.

Evidence Act, S. 24—Confession, when not in police custody, to respectable person and not obtained as a result of duress is admissible and sufficient to convict the confessor.

Confession made by an accused to a respectable and reliable person when he was not in police custody and is not obtained as a result of duress or undue influence is very reliable and valuable evidence against him and upon such confession alone the Court can find the accused guilty.

Covered by S. 24.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 179 (3)

(*Allahabad*)

BANERJI, J.

Pahalwan Singh and *others*—Accused —Applicants.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 348 of 1926, Decided on 16th September 1926, from an order of the S. J., Shahjahanpur.

Criminal P. C., S. 487.

A Magistrate cannot try for offences mentioned in S. 195 (a) committed before himself.

See *Criminal P. C., S.* 487.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69 73 and 81.

A. I. R. 1926 Journal 179 (4)

(*Patna*)

KULWANT SAHAY, J.

Anant Prashad Ray and *another*—Accused—Petitioners.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 400 of 1926, Decided on 14th July 1926, from a decision of the Addl. S. J., Muzaffarpur, D/- 29th May 1926.

(*a*) *Criminal P. C., S.* 59 — *Accused taking complainant to a dharmsala instead of to a police station—S.* 59 *does not protect him.*

Where accused suspecting the complainant to have committed an offence under S. 366, I. P. C., arrested him but instead of taking him to police station took him to a Dharamsala where he happened to see a police inspector whom the complainant was then handed over,

Held : that the accused was not protected by S. 59 and was thus guilty under S. 342, I. P. C.

(*b*) *Criminal trial—Act tending to communal disturbances — Deterrent sentence is not called for.*

It is no doubt dangerous to do anything which may lead to communal disturbances ; but this fact would not justify a Court in passing deterrent sentences and ignoring the facts standing in favour of the accused.

(*a*) *Is covered by S.* 59, *Criminal P. C.*

(*b*) *Is simple point.*

See also Law Reporting : Rules *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 180 (1)

(*Oudh*)

RAZA, J.

Sheo Dayal—Plaintiff—Appellant.

v.

Mt. Zohra and *others* — Defendants—Respondents.

Second Appeal No. 241 of 1926, Decided on 10th November 1926, from the judgment and decree of the 2nd Addl. Sub-J., Lucknow, D/- 6th April 1926.

Limitation Act, Art. 142 — *Claimant must prove possession within* 12 *years of suit — Enquiry as to adverse possession is irrelevant.*

In cases falling under Art. 142, the claimant must prove his possession within 12 years next preceding the date of the institution of the suit and in cases of that nature an inquiry into the question of adverse possession is irrelevant: *A. I. R.* 1925 *Oudh* 42, *Foll.*

Follows A. I. R. 1925 *Oudh* 42 *and Common point.* See 1926 *All.* 82; 1923 *All.* 418; 1923 *Cal.* 286; 1922 *Cal.* 557; 1924 *Lah.* 276; 1925 *Oudh* 42; 1924 *Pat.* 341; 6 *Pat. L. J.* 478.

See also Law Reporting Rules *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69 73 and 81.

A. I. R. 1926 Journal 180 (2)

(*Allahabad*)

BANERJI, J.

Narayan Das—Accused.

v.

Municipal Board, Jhansi —Opposite Party.

Criminal Reference No. 445 of 1926, Decided on 9th August 1926, made by the S. J., Jhansi, on 17th June 1926.

U. P. Municipalities Act, S. 307—*That notice was issued under the Act or a rule or bye-law must be proved.*

If a notice is not issued according to the provisions of the Municipalities Act, or under a rule or a bye-law, the person to whom the notice is issued may disobey it and yet not be liable to punishment; and to sustain a conviction under S. 307, it is necessary to prove that the notice was issued under the provisions of the Act or under a rule or a bye-law: *A. I. R.* 1925 *Oudh* 546, *Foll.*

Covered by S. 307.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 180 (3)

(*Lahore*)

JAI LAL, J.

Jagat Mal and *others*—Plaintiffs—Appellants.

v.

Khazan Chand and *others*—Defendants—Respondents.

Second Appeal No. 952 of 1926, Decided on 21st October 1926, from the decree of the Dist. J., Gujranwala, D/- 1st February 1926.

Transfer of Property Act, S. 91—*Mortgage not proved—Suit was dismissed.*

Where in a redemption suit mortgage alleged in the plaint was not proved:

Held: that the suit was rightly dismissed.

Point is on facts.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69 73 and 81.

A. I. R. 1926 Journal 180 (4)

(*Lahore*)

BROADWAY, J.

Mathra Das—Accused—Petitioner.

v.

The Crown—Opposite Party.

Criminal Revision No. 830 of 1926, Decided on 30th September 1926, from the order of the S. J., Amritsar, D/- 6th April 1926.

Penal Code, Ss. 403 *and* 408—*Railway claims—Inspector realising sale-proceeds of certain bags of goat-skins but not paying to the railway is guilty under S.* 403 *and not under S.* 408.

The duty of a claims Inspector of a Railway Company was to investigate claims and to report what arrangements he could make with persons making claims against the railway. He arranged, with the representative of a firm which had submitted a claim against the railway for loss of certain bags of goat-skins, to sell certain other bags of skins in addition to the bags sold to him by the A. T. S. and received from him a certain sum in payment, for ths 'bags of skins He never credited the money to the railway.

Held: that he was guilty of the offence of criminal misappropriation under S. 403 and not under S. 408.

On facts.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 181 (1)

(Oudh)

GOKARAN NATH MISRA AND RAZA, JJ.

Bhabhuti—Plaintiff—Appellant.

v.

Gur Dass—Defendant—Respondent.

Second Appeal No. 503 of 1926, and Misc. Appeal No. 31 of 1926, Decided on 24th November 1926, from the decree of the Addl. Sub-J., Gonda, D/- 19th August 1925.

(a) *Civil P. C., O. 47, R. 1—Decree appealed against—Review cannot be entertained.*

Where an application for review is filed after an appeal has been filed by the opposite party, the Court to which the application for review is made should decline to proceed with the application until the appeal has been heard and should direct the applicant to obtain the relief which he desires by means of review, by filing cross-objections to the same effect : 14 *O. C.* 108, *Foll.*

(b) *Limitation Act, Art. 61—Suit for contribution—Plaintiff must prove payment within three years prior to suit—Evidence Act, S. 101—Civil P. C., O. 7, R. 1 (c).*

Under Art. 61 the period for recovery of a sum paid by the plaintiff for the use of the defendant is three years from the date when the money is paid. Therefore in a suit for contribution by a co-mortgagee against his co-mortgagee, plaintiff has to establish the date when payment was made by him towards the mortgage and thereby to satisfy the Court that his claim for recovery of that amount was within limitation.

(c) *Contribution—Cause of action— Co-mortgagee.*

Mere execution of bond by plaintiff is not a payment for which contribution can be claimed. Actual payment must be proved : 19 *O. C.* 44 and 3 *O. L. J.* 441, *Foll.*

(a) *Follows* 14 *O. C.* 108.
(b) *Is simple point.*
(c) *Follows* 19 *O. C.* 44.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 181 (2)

(Lahore)

ADDISON, J.

Diwan Chand — Judgment-debtor — Appellant.

v.

Anjuman Indadi Karya and *others*—Decree-holders—Respondents.

Second Appeal No. 1595 of 1926, Decided on 28th October 1926, from the decree of the Dist. J., Gurdaspur, D/- 4th July 1926.

(a) *Execution—Decree binding.*

The executing Court can not go behind the decree.

(b) *Practice—New plea cannot be raised in second appeal.*

Where a ground is not taken in the two lower Courts it cannot be taken in the second appeal when it is not expressly a question of law.

(a) *Common point* : See *A. I. R.* 1924 *All.* 689 ; 1922 *Bom.* 195 ; 1925 *Cal.* 276 (2) ; 1924 *Lah.* 615 ; 1924 *Lah.* 448 ; 1923 *Mad.* 212 ; 1925 *Nag.* 377 ; 1924 *Pat.* 504.

(b) *A. I. R.* 1922 *P. C.* 105 ; 1922 *P. C.* 51 ; 1922 *All.* 346 ; 1923 *Lah.* 259 (1) ; 1922 *Lah* 363.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 181 (3)

(Calcutta)

SANDERSON, C. J., AND RANKIN AND GRAHAM, JJ.

Prohlad Chandra Modak—Appellant.

v.

Mohendra Chandra Ray and *others*—Respondents.

Letters Patent Appeal No. 1 of 1926, Decided on 20th May 1926, from a decree of B. B. Ghose, J., D/- 4th December 1925, in Appeal No. 2164 of 1923.

Landlord and tenant — Ejectment— Defendant in possession of land with tenant's permission—Tenant leaving the land, and defendant recorded as tenant in his place—Defendant becomes a tenant and his possession becomes adverse only when there is assertion of hostile title—Art. 144 applies.

Where it was found in an ejectment suit by landlord that the defendant had come into possession of the land with the permission of the tenant in possession and after the tenant left the land the defendant was recorded as tenant in the plaintiff's Sherista and continued to remain in possession :

Held : that the possession of the defendant would become adverse only where there was assertion of a hostile title, and Art. 144 would apply.

On facts.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 182 (1)

(*Allahabad*)

IQBAL AHMAD, J.

Dalle and *others*—Plaintiffs—Appellants.

v.

Amir and *others*—Defendants— Respondents.

Second Appeal No. 1368 of 1926, Decided on 26th October 1926, from the decree of the Sub-J., Meerut, D/- 30th April 1926.

(*a*) *Adverse possession—Defendant in possession in spite of compromise to deliver possession to plaintiffs in a previous suit—Defendants, possession is adverse to the plaintiffs.*

Where dispute with respect to a plot had been going on between the zemindars and the defendants' ancestors for a very long time and there was once a suit by the predecessors-in-title of the zemindars as against the predecessors-in-title of the defendants with respect to this very plot and that suit was compromised whereby the ancestors of the defendants agreed to remove their belongings from the plot in suit and to deliver possession to the zemindars within a specified time but that compromise was never acted upon and in the teeth of that decree the defendants' ancestors and the defendants continued to hold possession of the said plot.

Held : that apart from the nature of user by the defendants their possession can in no way be said to have been with the tacit permission of the zemindars, and must be held to have been in assertion of an adverse right.

(*b*) *Evidence Act, S.* 101—*Both parties adducing evidence in support of their case—Question of burden is immaterial.*

When both the parties adduced evidence in support of their respective allegations, the question of burden of proof becomes almost immaterial.

(*a*) *Point* (*a*) : *On facts.*

(*b*) *Point* (*b*): *is very common*: See *A. I. R.* 1922 *P. C.* 292; *A. I. R.* 1925 *Cal.* 61; *A. I. R.* 1922 *Cal.* 451 (2); 34 *C. L. J.* 333; *A. I. R.* 1924 *Nag.* 367; *A. I. R.* 1924 *Oudh* 271.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 182 (2)

(*Lahore*)

JAI LAL, J.

Allah Baksh and *another*—Defendants -Appellants.

v.

Shadi and *another*— Plaintiffs— Respondents.

Second Appeal No. 516 of 1926, Decided on 26th October 1926, from the decree of the Dist. J., Ludhiana D/- 3rd December 1925.

Limitation Act, Arts. 142 *and* 144 — *Declaratory decree in previous suit—Subsequent suit for possession—Adverse possession by defendants—Plaintiffs must prove possession within twelve years of suit—Merely obtaining declaratory decree is not sufficient.*

Plaintiffs, owners of a one-third share in the land in suit, instituted a declaratory suit in respect of that share, founding their cause of action on a denial of their title in partition proceedings. The suit was decreed. Plaintiffs subsequently instituted the suit for the possession of their one-third share. It was alleged in the plaint that after the previous suit had been decreed the plaintiffs had been receiving their share of the produce of the property till about a year before the date of the present suit. The plea of the defendants was adverse possession for more than twelve years.

Held : that in order to succeed it was necessary for the plaintiffs to prove that they have been in possession of the property in suit at some time within 12 years from the institution thereof and that the mere fact that they had obtained a declaratory decree was not sufficient if they had not followed the declaratory decree by any action to make their title perfect by obtaining possession : 45 *P. R.* 1914 and *A. I. R.* 1923 *P. C.*, 175, *Foll.*

Simply follows 45 *P. R.* 1914 and *A. I. R.* 1923 *P. C.* 175.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69 73 and 81.

A. I. R. 1926 Journal 182 (4)

(*Patna*)

DAWSON-MILLER, C. J., AND MACPHERSON, J.

Musi Kazim and *others* — Defendants —Appellants.

v.

Haji Mutasaddi and *others*—Plaintiffs —Respondents.

Second Appeal No. 1329 of 1922, Decided on 11th June 1925, from a decision of the Addl. Sub- J., Saran, D/- 18th August 1922.

Evidence Act, S. 92—*Evidence that property comprised in registered deed is different from that mentioned in deed, is not admissible.*

Parties to a registered deed are precluded by the provisions of S. 92 fro n giving evidence that the property compromised in the deed is different from that which on the face of the deed appears to have been mortgaged.

Covered by S. 92.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69 73 and 81.

A. I. R. 1926 Journal 183 (1)

(Oudh)

RAZA, J.

Gajadhar—Defendant—Appellant.

v.

Court of Wards, Birwa Mahnaun Estate—Plaintiff—Respondent.

Second Rent Appeals Nos. 1, 2 and 3 of 1926, Decided on 4th October 1926, from a decree of the Dist. J., Gonda, D/- 10th October 1925, in Rent Appeal No. 82 of 1925.

Adverse possession — Landlord and tenant —Assertion of a proprietary title by tenant in judicial proceeding if then unfounded can never confer proprietary title.

The simple assertion of a proprietary right in a judicial proceeding connected with the land in dispute which ex hypothesi was unfounded at the date when it was made cannot, by the mere lapse of 6 or 12 years, convert what was an occupancy or tenant title into that of an under-proprietor: *A. I. R.* 1923 *P. C.* 118, *Foll.*

Simply follows A. I. R. 1923 *P. C.* 118.

See also Law Reporting Rules: *A. I. R.* 1929 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 183 (2)

(Patna)

ADAMI, J.

Subda Santal and *another* — Petitioners.

v.

Kushal Santal—Opposite Party.

Criminal Revision No. 20 of 1926, Decided on 17th February 1926, from an order of the 1st Cl. Dy. Mag., Dhalbhum, Jamshedpur, D/- 17th November 1925.

Criminal P. C., S. 145—*Court has to decide who is in possession and not who is entitled to possession.*

It is not the duty of the Court in proceedings under S. 145 to declare who is entitled to possession. The declaration must be as to who is actually in possession and entitled to remain in possession till a decision is given by a competent Court.

Section 145, *Sub-Ss.* 4 *and* 6 *are clear.*

See also A. I. R. 1925 *Pat.* 33; *A. I. R.* 1925 *Oudh* 149; 34 *Mad.* 138.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 183 (3)

(Lahore)

COLDSTREAM, J.

Jagan Nath-Sobha Ram of Amritsar—Decree-holders—Appellants.

v.

Buta Mal and *another*—Judgment-debtors—Respondents.

Miscellaneous Second Appeal No. 2474 of 1925, Decided on 5th October 1926, from the order of the Addl. Dist. J., Amritsar, D/- 7th May 1925.

Civil P. C., O. 21, *R.* 50 (2)—*Execution of decree against firm — Executing Court can adjudge particular person to be partner—Civil P. C., S.* 42.

The executing Court has power to adjudge whether a particular person is or is not a partner of the firm in execution of a decree against the firm: *A. I. R.* 1921 *All.* 199, *Rel. on.*

Point covered by Civil P. C., O. 21, *R.* 50, *Sub.-R.* 2.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 183 (4)

(Oudh)

RAZA, J.

Kunwar Bahadur and *others* — Defendants—Appellants.

v.

Naib and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 311 of 1925, Decided on 13th April 1926, from the decree of the Sub. J., Bara Banki, D/- 24th February 1925.

Civil P. C., S. 100—*Finding of fact.*

Findings of fact based upon admissible evidence cannot be impugned in second appeal on the ground that the finding is erroneous.

Common point: See *A. I. R.* 1925 *Cal.* 469; *A. I. R.* 1922 *All.* 283 (2); *A. I. R.* 1925 *Lah.* 377; *A. I. R.* 1925 *Nag.* 111; *A. I. R.* 1922 *Oudh* 96; *A. I. R.* 1925 *Lah.* 333 (2); *A. I. R.* 1923 *Oudh* 14; *A. I. R.* 1925 *Pat.* 384; *A. I. R.* 1925 *Lah.* 150; 4 *L. L. J.* 464; *A. I. R.* 1925 *Mad.* 823.

See also Law Reporting Rules *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 184 (1)

(*Lahore*)

ADDISON, J.

Fazal—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 198 of 1926, Decided on 28th June 1926, from an order of the S. J. Rawalpindi, D/- 13th January 1926.

Penal Code, S. 397 — Several persons .committing dacoity, one of them causing grievous hurt—Others cannot be convicted under S. 397.

In a case where a number of persons jointly commit robbery or dacoity S. 397 applies tc those only who actually use any deadly weapon but the others cannot be convicted under S. 397: *A. I. R.* 1926 *Lah.* 48, *Foll.*

Follows A. I. R. 1926 *Lah.* 48.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 184 (1)

(*Lahore*)

DALIP SINGH, J.

Gulam Rasul—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 29 of 1926, Decided on 8th March 1926, from an order of the S. J., Dera Ghazi Khan, D/- 20th October 1925.

Penal Code, S. 99—Exceeding right of defence.

The deceased assaulted the appellant and was about to hit him with a clod of earth when the appellant struck him two violent blows with a hatchet which he held in his hand and thereby caused his death. The deceased was of a stronger physique than the appellant.

Held: that the accused was not under apprehension of grievous hurt and thus he exceeded his right of private defence in causing the death of his assailant.

On facts.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

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A. I. R. 1926 Journal 184 (3)

(*Lahore*)

BROADWAY, J.

Hazara Singh and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revision No. 524 of 1926, Decided on 29th September 1926, from the order of the S. J., Lahore, D/- 2nd March 1926.

(*a*) *Penal Code, S. 366—Mere abduction without criminal intent is not an offence.*

Mere abduction without criminal intent of one of the kinds specified in the Indian Penal Code is not recognized as an offence.

(*b*) *Evidence Act, S. 14—Intention may be deduced from conduct of parties.*

Intention has to be proved like any other fact and may of course be deduced from the conduct of the parties.

(*a*) *Section is clear.*

(*b*) *Simple point.*

See also Law Reporting Rules: *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 184 (4)

(*Lahore*)

ZAFAR ALI, J.

Ghulam and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 663 of 1926, Decided on 12th October 1926, from the order of the Addl. Dist. Mag., Shahpur, D/- 1st June 1926.

Penal Code, S. 366—Abducted girl not forthcoming—Principal witness a boy of 10 and brother of abductive girl's husband—Other witnesses not giving immediats information to her relations—Conviction was set aside.

Where the abducted girl was not forthcoming and the principal witness was a boy of ten years who was the younger brother of the husband of the abductive girl, and other witnesses were persons who saw the girl forcibly being taken away and though she was weeping and crying had not done anything to rescue her or to inform her relatives immediately.

Held: that the abduction was not proved and that the conviction must be set aside.

On facts.

See also Law Reporting Rules: *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 185 (1)

(*Allahabad*)

SULAIMAN AND BANERJI, JJ.

Behari—Accused—Appellant.

v.

King-Emperor—Opposite Party.

Criminal Appeal No. 507 of 1926, Decided on 7th September 1926, from the order of the S. J., Muttra, D/- 12th July 1926.

Criminal P. C., (amended 1923), S. 288—Statements before committing Magistrate are admissible for all purposes.

Statements made before a committing Magistrate, when admissible under the Evidence Act, can be admitted for all purposes and not only for the purpose of corroboration or contradiction: 3 *Pat. L. R.* 781, *Appr.*

See Section 288 (*amended*).

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69. 73 and 81.

A. I. R. 1926 Journal 185 (2)

(*Patna*)

ROSS, J.

Khobhari Singh and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revision No. 509 of 1926, Decided on 26th August 1926, from an order of the Dist. Mag., Patna, D/- 4th June 1926.

Penal Code, S. 426—Intention to cause damage.

Where a person cut his own tree and allowed it to fall on another's tree to protect his own trees in spite of his being told not to do so by such another:

Held: that he must be presumed to have intended to cause damage to such tree.

On facts.

See also Law Reporting Rules: *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69. 73 and 81.

A. I. R. 1926 Journal 185 (3)

(*Lahore*)

JAI LAL, J.

Sheo Karan and *others*—Defendants—Appellants.

v.

Chiranji Lal and *others*—Plaintiffs—Respondents.

Second Appeal No. 1059 of 1926, Decided on 29th October 1926, from an order of the Dist. J., Karnal, D/- 19th January 1926.

Registration Act, S. 49—Deeds of sale and partition inadmissible for want of registration—Factum of partition and nature of possession can be proved by oral evidence.

Where a deed of sale and that of partition are inadmissible in evidence for want of registration, that does not debar a party from proving the factum of partition and possession of the property covered by them, and the partition deed and the sale deed can be relied upon to determine the nature of possession.

Common point: See 1925 *All.* 206 (1); 26 *C. W. N.* 65; 1925 *Lah.* 491; 1923 *Lah.* 495; 43 *Mad.* 244 (*P.C.*); 1924 *Mad.* 800; 1924 *Pat.* 641.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 185 (4)

(*Rangoon*)

HEALD, J.

Nga Tun Sein—Accused—Appellant.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 1136-B of 1926, Decided on 3rd September 1926, from the order of the Sub-Divl. Mag., Moulmein, in Criminal Miscellaneous No. 214 of 1926.

Burma Habitual Offendars Restriction Act and Excise Act, S. 64A—Scope.

The Burma Habitual Offenders Restriction Act may not be applied to persons who are provided against under S. 64A of the Burma Excise Act: *A. I. R.* 1926 *Rang.* 182, *Foll.*

Simply follows A. I. R. 1926 *Rang.* 182.

See also Law Reporting Rules: *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 185 (5)

(*Rangoon*)

CHARI, J.

M. Rdmanathan—Accused—Appellant.

v.

King-Emperor—Opposite Party.

Criminal Appeal No. 1179 of 1926, Decided on 2nd September 1926, from the order of the 5th Addl. Mag., Rangoon, in Criminal Regular Trial No. 547 of 1925.

Penal Code, S. 498—*Marriage must be strictly proved.*

In proving an offence in which marriage is an essential ingredient, it is necessary that the fact of the marriage must be strictly proved.

Common point: See *A. I. R.* 1925 *Rang.* 328; *A. I. R.* 1925 *Oudh* 701; 5 *Cal.* 566; 3 *O. C.* 342; 5 *All.* 233; 17 *Bom. L. R.* 75; 18 *A. L. J.* 411.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 186 (1)

(*Allahabad*)

DALAL, J.

Raghubans Narain Singh—Defendant—Appellant.

v.

Manphal Singh and *others*—Respondents.

Second Appeal No. 1606 of 1923, Decided on 19th April 1926, from a decree of the Sub-J., Meerut, D/- 31st July 1923.

Landlord and tenant—Occupancy holding—Landlord cannot cut trees growing on occupancy holding as long as tenancy continues unless there is custom or contract to the contrary.

In the absence of custom or of a contract to the contrary a zamindar has no right to interfere with the enjoyment by his tenant of the trees upon his holding as long as the relation of landlord and tenant subsists. A tenant has a right to enjoy all the benefits of growing timber on his land during his occupancy: 30 *All.* 134 and 1864 *W. R.* 367, *Foll.*; 11 *M. I. A.* 295, *Dist.*

Simply follows 30 *All* 134 and 1864 *W. R.* 367.

See also Law Reporting Rules, *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 186 (2)

(*Madras*)

ODGERS, J.

Erulandi Thevan—Appellant.

v.

S. Subramania Iyer and *others*—Respondents.

Second Appeal No. 1243 of 1923, Decided on 18th March 1926, from the decree of the 2nd Addl. Sub-J. Madura, in A. S. No. 50 of 1922.

(*a*) *Hindu Law—Alienation by guardian, de-facto—Natural brother of adopted minor can act as de facto guardian—Civil P. C., S.* 100—*Question of fact.*

A natural brother as de facto guardian of an adopted minor can act as such and hence a mortgage effected by him and on attaining majority approved and discharged by the minor cannot be questioned by a complete stranger, and the question cannot be agitated for the first time in second appeal: *A. I. R.* 1926 *Mad.* 457, *Foll.*

(*b*) *Civil P. C., S.* 100—*Question whether mortgage is properly executed cannot be raised for the first time in second appeal.*

The question whether a mortgage is properly executed is one of mixed law and fact and cannot be raised for the first time in the second appellate Court: *A. I. R.* 1924 *Mad.* 513, *Foll.*

(*a*) *Simply follows A. I. R.* 1926 *Mad.* 457.

(*b*) *Simply follows A. I. R.* 1924 *Mad.* 513.

See also Law Reporting Rules, *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 186 (3)

(*Calcutta*)

CUMING AND B. B. GHOSE, JJ.

Wasif Ali Meerza Khan and *another*—Defendants—Appellants.

v.

Amalendu Narayan Roy and *others*—Plaintiffs and Pro forma Defendants—Respondents.

Appeal No. 2539 of 1923, Decided on 3rd March 1926, from the appellate decree of the Dist. J., Murshidabad, D/- 12th June 1923.

Limitation Act, Art. 142—*Suit for possession—Defendant admitting dispossession—Art.* 142 *applies.*

Where the defendant admits dispossession of the plaintiff; in a suit for recovery of possession; the suit is governed by Art. 142.

Common point: see *A. I. R.* 1922 *Bom.* 243; *A. I. R.* 1922 *Cal.* 176; *A. I. R.* 1925 *Lah.* 47; *A. I. R.* 1925 *Nag.* 370; *A. I. R.* 1922 *Cal.* 557; *A. I. R.* 1925 *Oudh* 42

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 187 (1)

(*Lahore*)

HARRISON AND JAI LAL, JJ.

Crown—Appellant.

v.

Ibrahim—Accused—Respondent.

Criminal Appeal No. 933 of 1925, Decided on 20th February 1926, from the order of the 1st Cl. Mag., Lyallpur, D/- 18th July 1925.

Punjab Excise Act, S. 61 (c)—Accused an Arain.

The fact that the accused is an Arain who has nothing to do with liquor, is no ground in accused's favour.

Simple point.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 187 (2)

(*Oudh*)

STUART, C. J., AND HASAN, J.

Jang Bahadur Lal and *others*—Defendants—Appellants.

v.

Bhaya Raghunath Singh and *another*—Plaintiffs—Respondents.

Second Appeal No. 473 of 1925, Decided on 8th November 1926, from the decree of the Dist. J., Gonda, D/- 4th July 1925.

(*a*) *Hindu Law—Alienation by father to pay off prior mortgage—Sons are not bound merely by force of pious obligation.*

Where the alienation in suit is wholly a renewal of the previous mortgage made by the father, sons cannot be bound by the alienation made by the father on the sole ground of pious obligation: *A. I. R.* 1925 *Oudh* 9. *Foll.*

(*b*) *Hindu Law—Debts—Grandson and great-grandson are bound by alienation made to pay grandfather's and great-grandfather's debt.*

An alienation of the joint ancestral family property in satisfaction of the debts of an ancestor when such debts were neither immoral nor illegal and when the ancestor was the father of the member making the alienation and the grandfather of another member sought to be bound and the great-grandfather of another member, is an alienation for legal necessity: *A. I. R.* 1926. *P. C.*. 105. *Foll.*

(*a*) *Follows A. I. R.* 1925 *Oudh* 9.

(*b*) *Follows A. I. R.* 1926 *P. C.* 105.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 187 (3)

(*Oudh*)

GOKARAN NATH MISRA AND RAZA, JJ.

Gajadhar Lal and *others*—Defendants—Appellants.

v.

Makhan Lal—Plaintiff—Respondent.

Second Appeal No. 466 of 1925, Decided on 24th November 1926, from the decree of the Addl. Dist. J., Lucknow, D/- 1st May 1925.

Hindu Law—Alienation by widow or mother—Alienee must prove facts justifying alienation—In absence of legal necessity, consent of next reversioners may validate alienation but ordinarily whole body of reversioners must consent.

A person who deals with a Hindu widow or a Hindu mother, having a limited estate, is bound to establish the facts which justify the transaction under which he claims. Alienation by a Hindu widow or a Hindu mother without proof, either of legal necessity or of reasonable inquiry and honest belief as to its existence but with the consent of the next reversioner or reversioners for the time being, may be valid and binding on the actual reversioner, if the presumption of legal necessity or of reasonable inquiry and honest belief raised by such consent is not rebutted by more cogent proof.

Ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible: 30 *All.* 1 (*P. C.*), *Foll.*

Common point: See 42 *Cal.* 876 (*P. C.*); 1922 *All.* 169; 64 *I. C.* 474; 14 *Bom. L. R.* 602; 40 *I. C.* 865; 40 *Cal.* 721 (*F. B.*); 11 *I. C.* 24; *Also follows* 30 *All.* 1 (*P. C.*).

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 187 (4)

(*Lahore*)

ADDISON, J.

Krishna and *others*—Plaintiffs—Appellants.

v.

Phusa and *another*—Defendants—Respondents.

Second Appeal No. 898 of 1925, Decided on 5th October 1926, from a decree of the Dist. J., Hissar, D/- 23rd January 1925.

Punjab Tenancy Act, Ss. 57 and 59—Succession to occupancy holding as against landlord—Joint tenancy—One line dying out—Other line surviving—Landlord cannot claim the share of the line dying out.

The principle to be followed in cases of succession to an occupancy holding, as against the

landlord, is that joint tenants of a holding, even though it was not held by their common ancestor, are to be regarded as a single tenant and as long as any of them or the descendants of any of them survive, the landlord cannot claim in the share of any tenant whose line has died out : *A. I. R.* 1924 *Lah.* 127, *Foll.*

Simply follows A. I. R. 1924 *Lah.* 127.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 188 (1)

(*Allahabad*)

BANERJI, J.

Muhammad Habib-Ur-Rahman — Plaintiff—Appellant.

v.

Dharam Singh and *another*—Defendants—Respondents.

Second Appeal No. 496 of 1924, Decided on 28th June 1926, from a decrce of the Addl. Dist. J., Meerut, D/- 14th December 1923.

Agra Tenancy Act (*Act 2 of* 1901), *S.* 97—*Presentation and not attestation must be within* 4 *months.*

The presentation of the document to the Kanungo must be within 4 months and not the actual attestation.

Exactly covered by the section.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61 69, 73 and 81.

A. I. R. 1926 Journal 188 (2)

(*Allahabad*)

DALAL AND PULLAN, JJ.

Tursi Ram—Plaintiff—Appellant.

v.

Bidhi Chand and *others*—Defendants—Respondents.

Second Appeal No. 570 of 1924, Decided on 10th October 1926, from a decree of the Dist. J., Agra, D/- 4th January 1924.

U. P. Land Revenue Act, S. 144—*Lambardar i entitled to lambardari dues in absence of contract to the contrary.*

Co-sharers are liable to pay lambardari dues under the orders of the Board of Revenue unless they could prove a contract to the contrary : *A. I. R.* 1923 *All.* 41, *Foll.*

Simply follows A. I. R. 1923 *All.* 41.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45. 53 61, 69, 73 and 81.

A. I. R. 1926 Journal 188 (3)

(*Allahabad*)

DANIELS, J.

Indar Dat Pande — Plaintiff—Appellant.

v.

Ram Parsan Pande and *another*—Defendants—Respondents.

Second Appeal No. 517 of 1924, Decided on 30th June 1926, from a decree of the Dist. J., Benares, D/- 5th January 1924.

Hindu Law—Widow—Alienation by—Suit by reversioner for declaration that alienation is not for legal nscessity—Other reversioners are bound —Civil P. C., S. 11.

A suit by a reversioner to set aside an alienation by the widow as being without legal necessity is a representative suit the result of which is binding on all the reversioners ; *A. I. R.* 1924 *P. C.* 247, *Foll.*

Simply follows A. I. R. 1924 *P. C.* 247.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 188 (4)

(*Oudh*)

RAZA, J.

Lachhmi Singh — Plaintiff — Appellant.

v.

Mt. Bijairaj Kuer and *others*—Defendants—Respondents.

Second Appeal No. 534 of 1924, Decided on 3rd May 1926, from the judgment of the Addl. Sub-J., Sultanpur, D/- 11th September 1924.

(*a*) *Transfer of Property Act, S.* 60—*Redemption—Plaintiff must prove mortgage although defendant admitsto be mortgagee.*

Even when the defendant admits in a redemption suit that he is a mortgagee of the property, the plaintiff's suit must fail, where he fails to prove the mortgage on which he relies and which he alleges in his plaint : 3 *O. C.* 153, *Foll.*

(*b*) *Civil P. C., S.* 100 — *Finding of fact though erroneous is not appealable.*

There is no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact : 24 *O. C.* 221, *Foll.*

Point (*a*) *simply follows* 3 *O. C.* 173 ; and *Point* (*b*) *follows* 24 *O. C.* 221.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61 69, 73 and 81.

A. I. R. 1926 Journal 189 (1)

(*Allahabad*)

DANIELS, J.

Abdur Rahman and *others*—Plaintiffs—Appellants.

v.

Ahmadullah — Defendant — Respondent.

Second Appeal No. 577 of 1924, Decided on 5th July 1926, from a decree of the Dist. J., Agra, D/- 18th January 1926.

(*a*) *Mortgage — Construction—One document should not be construed with reference to another.*

It is dangerous to construe one document with reference to another. Every case must be decided on a construction of the document in dispute together with any admissible extraneous evidence as to the circumstances which may be available.

(*b*) *Mortgage—Construction.*

A document purporting to be a sale deed of a house provided for re-sale to the vendor on payment of the price within six years, and further stipulated that the transferrer shall be liable to keep the house in repair. This stipulation as to repairs was quite independent of whether the transferrer repaid the money within six years or not. It was further provided after the expiry of 6 years the vendor shall have no power to get back the house sold.

Held : that the document constituted a mortgage by conditional sale.

(*a*) *Common point* : *A. I. R.* 1924 *All.* 324 (*F. B.*); *L. R.* 3 *A.* 308 ; *A. I. R.* 1925 *Cal.* 656 ; *A. I. R.* 1925 *Oudh* 11 ; 8 *O. L. J.* 481.

(*b*) *Involves a question of construction about a particular document only.*

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61,69, 73 and 81.

A. I. R. 1926 Journal 189 (2)

(*Madras*)

VENKATASUBBA RAO, J.

Valan—Defendant—Appellant.

v.

Kadirvel Chettiar—Plaintiff—Respondent.

Second Appeal No. 613 of 1924, Deciden on 15th October 1925, from a decree of the Sub-J., Salem, in Appeal Suit No. 74 of 1922.

Tort—Nuisance—Existence of latrine opening in street is not nuisance to person living just opposite.

A latrine with a small door-way opening in a street in a town cannot be removed on the ground of a nuisance to a person living just opposite to it.

On facts.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61 69, 73 and 81.

A. I. R. 1926 Journal 189 (3)

(*Lahore*)

HARRISON, J.

Attar Singh—Petitioner.

v.

Hari Singh and *another* — Respondents.

Criminal Revision No. 1166 of 1926, Decided on 22nd October 1926, reported by S. J. Ambala.

Criminal P. C., S. 137—*Section is imperative—Magistrate ought to record evidence.*

Section 137 is imperative and a Magistrate in a case of public nuisance must record evidence as in a summons case : 32 *P. R. Cr.* 1917 and 42 *Cal.* 702, *Foll.*

Simply follows 32 *P. R. Cr.* 1917.

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 189 (4)

(*Lahore*)

ADDISON, J.

Balwant Singh — Plaintiff — Appellant.

v.

Charan Singh and *another* — Defendants—Respondents.

Second Appeal No. 1125 of 1925, Decided on 5th October 1926, from the decree of the Dist. J., Ambala, D/- 3rd February 1925.

Civil P. C., O. 17, *R.* 3—*Time specially to produce evidence—Failure to produce evidence—Suit cannot be disposed of forthwith.*

The Court is not empowered to dispose of a suit forthwith for failure of a party to produce his evidence unless time has been granted to him especially for that purpose :

Point covered by the rule (before amendment)). After amendment, no good law.

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 189 (5)

(*Oudh*)

GOKARAN NATH MISRA, J.

Chandrika Dat Ram Pandey and *another*—Applicants.

v.

Shyam Lal—Opposite Party.

Review Application No.5 of 1926, Decided on 17th March 1926, from the order of Ashworth, J., D/- 18th February 1926.

(*a*) *Civil P. C., S.* 115—*Order superseding arbitration is case decided—Order passed by Small Cause Court Judge can be reviewed.*

An order superseding an arbitration is a final order so far as the parties to the case are concerned. Therefore when such an order is passed by a Small Cause Court Judge, the High Court can revise the order: 13 *O. C.* 109; 15 *O. C.* 304, *Foll.*; *A. I. R.* 1925 *All.* 566, *Diss. from.*

(*b*) *Civil P. C., O.* 47, *R.* 1—*Grounds which could have been raised at the hearing are no grounds for review.*

It is most unfair to the Judges of the Court to file applications for review against their judgments on grounds not raised (although they could have been raised) before them at the time of the hearing. Applications for review raising such grounds ought to be rejected.

(*a*) *Simply follows* 13 *O. C.* 109 *and* 15 *O. C.* 304.

(*b*) *Simple point.*

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 190 (1)

(*Lahore*)

BROADWAY AND ZAFAR ALI, JJ.

Ram Saran Das—Defendant—Appellant.

v.

Rala Ram and *another*—Plaintiffs—Respondents.

First Appeal No. 1879 of 1922, Decided on 26th November 1926, from the decree of the 1st Cl. Sub-J., Sargodha, D/- 1st May 1922.

Punjab Pre-emption Act (1 *of* 1913), *S.* 16—*Bhera, District Shahpur—Custom of pre-emption exists.*

In the town of Bhera, Shahpur district, there is a custom of pre-emption based on contiguity: 42 *P. R.* 1891, *Foll.*

Simply follows 42 *P. R.* 1891.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 190 (2)

(*Oudh*)

RAZA, J.

Jahangir—Defendant—Appellant.

v.

Ram Harakh and *others*—Plaintiffs—Respondents.

Second Appeal No. 80 of 1925, Decided on 9th December 1925, from a decree of the Sub-J., Partabgarh, D/- 31st October 1924.

Mortgage—Grove planted by mortgagee without mortgagor's consent—Mortgagor is entitled to the grove unconditionally.

Where a mortgagee in possession plants a grove without the consent of the mortgagor, which is uot necessary for the preservation of the property and of which separate possession is not possible, the mortgagor is entitled to possession of the grove unconditionally: 22 *All.* 83, *Foll.*

Covered by S. 63 of the T. P. Act.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 190 (3)

(*Calcutta*)

SUHRAWARDY AND DUVAL, JJ.

Srilal Agarwalla and *others*—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Misc. Petition No. 51 of 1926, Decided on 1st April 1926.

(*a*) *Criminal P. C., S.* 61—*Calcutta Police.*

Section 61 does not apply to the Calcutta Police: *A. I. R.* 1925 *Cal.* 587, *Foll.*

(*b*) *Calcutta Police Act, Ss.* 76 *and* 6—*Arrest under orders of Deputy Commissioner of Police—Persons arrested can be detained in Police custody till investigation is over, but if they cannot be released on bail they should be produced before a Magistrate withoul unreasonable delay.*

It is not the duty of the Deputy Commissioner of Police, a Justice of the Peace, to place, an offender forthwith before a Magistrate, for in the first instance there is no period mentioned in the Calcutta Police Act within which this must be done, and in the second place, as a Justice of the peace, the Deputy Commissioner is entitled to take such steps as may be necessary to complete an investigation before placing the matter before a Magistrate: *A. I. R.* 1925 *Cal.* 587, *Rel. on.*

It is also proper that if the officer does not see his way to release the petitioners on bail, he should produce them before a Magistrate with as little delay as possible, so that the Magistrate may determine whether in the circumstances of the case the persons arrested are entitled to be enlarged on bail, and if there is any improper exercise of such power, that can be corrected by the High Court under suitable provisions of the law, such as S. 491, Criminal P. C.

Overruled by A. I. R. 1926 *Cal.* 1121 (*F.B.*).

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 191(1)

(*Rangoon*)

HEALD, J.

Nga San Tin—Accused—Applicant.

v.

King-Emperor—Opposite Party.

Criminal Mis. Application No. 31 of 1926, Decided on 9th August 1926, from an order of the S. J., Prome, in Criminal Mis. Trial No. 5 of 1926.

Criminal P. C., Ss. 497 and 498—Release on bail.

A person accused of murder shall not be released on bail, either by the Police or the Court before whom he is brought, if there appear reasonable grounds for believing that he has been guilty of the offence of which he is accused on the ground that the case against him does not go beyond mere suspicion.

Section 497 covers the case.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 191(2)

(*Madras*)

SPENCER AND RAMESAM, JJ.

Yelukur Subhadramma and *another*—Defendants—Appellants.

v.

Yelkur Venkataseshiah Chetty and *others*—Plaintiffs—Respondents.

Appeal No. 284 of 1922, Decided on 16th April 1926, from a decree of the Sub-J., Kurnool, in Original Suit No. 51 of 1920.

Hindu Law—Authority to adopt—Suit to declare authority to be invalid before adoption.

Where a suit for declaration that the authority to adopt was invalid had been tried and decided in the lower Court, High Court in second appeal applied its mind only to the question whether the case was a fit one in which a Court with a due exercise of discretion should grant a declaration before any adoption has been made.

Quaere : Whether a suit for declaration that an authority to adopt is invalid lies where no adoption has actually been made.

On facts.

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 191(3)

(*Oudh*)

WAZIR HASAN, J.

Narotam Dass—Decree-holder—Appellant.

v.

Narain Das—Judgment-Debtor—Respondent.

Second Execution of Decree Appeal No. 34 of 1926, Decided on 17th November 1926, from the order of the Dist. J., Fyzabad, D/- 24th February 1926.

Oudh Rent Act (1886), *S.* 145—*Decree amended—Time for execution runs from amended decree—Civil P. C., S.* 48.

Where a decree has been amended, time for execution runs from the date of amended decree : 33 *All.* 264 (*P. C.*), *Foll.*

Simply follows 33 *All.* 264 (*P.C.*).

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 191 (4)

(*Oudh*)

GOKARAN NATH MISRA AND RAZA, JJ.

Bhagwan Singh and *another*—Applicants—Appellants.

v.

Chedilal—Opposite Party—Respondent.

Miscellaneous Appeal No. 41 of 1926, Decided on 3rd December 1926, from the order of the Dis. J., Fyzabad, D/- 3rd September 1926.

Provincial Insolvency Act (1920), *S.* 35—*Debt due to one creditor only paid, others remaining unpaid—Adjudication cannot be annulled.*

A Court has no jurisdiction to pass an order of annulment of adjudication until all the debts due from the insolvent have been paid off, and so where the debt due to only one creditor has been paid off and the debts due to other creditors are still unpaid, the order of annulment passed by the Court must be set aside.

Section 35 is clear.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 191 (5)

(*Oudh*)

STUART, C. J.

King Emperor—Appellant.

v.

Jagannath and *others*—Respondents.

Criminal Reference No. 57 of 1926, Decided on 4th November 1926, made by the S.J. Lucknow.

Criminal P. C., S. 215—*Proof as to allegations not sufficient—Commitment was quashed.*

Where the allegations for the prosecution even if they were proved by the evidence were not sufficient to constitute an offence, commitment was quashed.

Simple point.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 192 (1)

(*Madras*)

SPENCER AND RAMESAM, JJ.

Nimmagadda Seshayya and *another*—Defendants—Appellants.

v.

Cherukury Meenakshamma and *others*—Plaintiffs—Respondents.

Civil Appeals Nos. 164 and 406 of 1923, Decided on 5th May 1926, from a decree of the Sub-J., Masulipatam, in Original Suit No. 5 of 1919, D/- 21st November 1922.

(*a*) *Guardian and ward—Transaction between, must be looked at with suspicion if ward had no independent advice.*

A transaction between a guardian and ward must be scrutinized with great care and if the ward is not represented by independent persons the transaction must be regarded with suspicion.

(*b*) *Registration Act, S.* 17—*Agreement to convey immovable property contemplating another document is admissible without registration.*

A mere agreement to convey an interest in immovable property, which contemplates the execution of another document is admissible in evidence without registration : 37 *Mad.* 408 and *A. I. R.* 1922 (*P. C.*) 266, *Foll.*

(*c*) *Part-performance—Legatee agreeing to relinquish his right in the bequeathed lands for cash by unregistered deed—Suit for recovery of lands—Payment and acceptance of cash is sufficient defence.*

A legatee sued for recovery of certain immovable property bequeathed to him. The defendant in possession of the estate relied upon an unregistered document by which the plaintiff received a cash consideration for the lands and relinquished his rights and agreed to re-convey the lands.

Held : that though the sale-deed contemplated was not executed, part performance of the agreement by payment and acceptance of the consideration was a valid defence to the claim of the plaintiff : *A. I. R.* 1924 *Mad.* 271 (*F. B.*), *Foll.*

(*a*) *is simple.*

(*b*) *follows A. I. R.* 1922 *P. C.* 266.

(*c*) *follows A. I. R.* 1924 *Mad.* 271 (*F. B.*).

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 192 (2)

(*Lahore*)

HARRISON AND FFORDE, JJ.

Kadar and *others*—Plaintiffs—Appellants.

v.

Shib Ram and *others*—Defendants—Respondents.

Second Appeal No. 647 of 1922, Decided on 28th November 1926, from the decree of the Dist. J., Delhi, D/- 23rd January 1922.

Adverse possession—Vacant site—Tying cattle or keeping heaps of dung is insufficient to establish adverse possession or ownership—Landlord and tenant—Abadi.

Tying up of cattle and keeping of heaps of dung on vacant site in village abadi is precisely such occupation as is wholly insufficient to create an adverse title or to establish acts of ownership : 16 *Bom.* 338, *Foll.*

Common point : See *A. I. R.* 1923 *Lah.* 25 ; 1923 *All.* 399 ; 117 *P. L. R.* 1917 ; 13 *N. L. R.* 25 ; 21 *Mad.* 53 ; 33 *Bom.* 712 ; 16 *Bom.* 338.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 192 (3)

(*Allahabad*)

DALAL AND PULLAN, JJ.

Bishambhar Nath and *others*—Defendants—Appellants.

v.

Madhuri Saran and *another*—Plaintiffs—Respondents.

First Appeal No. 333 of 1923, Decided on 21st October 1926, from a decree of the 2nd Sub-J., Cawnpore, D/- 29th June 1923.

Hindu Law—Joint family—Alienation by father—A very small portion of the consideration not for necessity—Alienation should be upheld.

Where a very small proportion of the consideration for an alienation by father is found to be not suppported by legal necessity, the transaction should not be set aside but a money decree should be given to the plaintiff for the amount not covered by necessity. : *A. I. R.* 1925 *All.* 624 (*F. B.*) ; *A. I. R.* 1925 *All.* 324 ; and *A. I. R.* 1922 *P. C.* 307 ; *Foll.*

Simply follows A. *I. R.* 1925 *All.* 624 ; (*F.B.*); *A. I. R.* 1925 *All.* 324 and *A. I. R.* 1922 *P. C.* 307.

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 193 (1)

(*Allahabad*)

SULAIMAN AND BOYS, JJ.

Babu Lal and *others*—Plaintiffs—Appellants.

v.

Mt. Kashmiro and *others*—Defendants—Respondents.

First Appeal No. 157 of 1923, Decided on 29th June 1926, from a decree of the Sub-J., Meerut, D/- 22nd December 1922.

Hindu Law—Joint family—Antecedent debt—Previous debt in favour of the same mortgagee forming consideration of second mortgage—Former debt is still antecedent debt.

The fact that a previous debt in favour of the same mortgagee is set off and forms the consideration for the second mortgage deed does not prevent the former debt from being an antecedent debt ; *A. I. R.* 1927 *All.* 150, *Foll.*

Simply follows A. I. R. 1927 *All.* 150.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 193 (2)

(*Allahabad*)

MUKERJEE, J.

Mangal Kurmi and *another*—Defendants—Appellants.

v.

Sheo Saran and *others*—Plaintiffs—Respondents.

Second Appeal No. 1576 of 1923, Decided on 12th March 1926, from a decree of the 1st Addl. Dist. J., Gorakhpur, D/- 5th April 1923.

(*a*) *Guardians and Wards Act, S.* 30—*Alienation by guardian in contravention of Court's order is not protected.*

Alienation of the property of a minor by his guardian in contravention of the directions contained in the order of the Court sanctioning the alienation is not protected by the sanction.

(*b*) *Guardians and Wards Act, S.* 30—*Sale without sanction is only voidable and not void—Minor obtaining benefit must restore it before avoiding sale.*

A sale without the sanction of the Court by the certificated guardian is not void in toto but is only voidable, and if the minor has been benefited, he cannot avoid the sale without restoring the benefit to the purchasers.

(*a*) *Is simple.*

(*b*) *Is covered by S.* 30.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 193 (3)

(*Lahore*)

BROADWAY AND ZAFAR ALI, JJ.

Muhammad Bakhsh and *another*—Plaintiffs—Appellants.

v.

Shadi Muhammad and *another*—Defendants—Respondents.

Second Appeal No. 1397 of 1923, Decided on 3rd November 1926, from the decree of the Addl. J., Lahore, D/- 5th March 1923.

Evidence Act, S. 102—*Unregistered document containing admission of payment of consideration—Onus to prove that consideration did not pass is on party executing the document.*

Where an unregistered document the execution of which is admitted or proved contains an admission of the payment of the consideration, the onus lies on the person executing the document to prove that what he himself admitted to be true was, as a matter of fact, false and that he did not receive the consideration : *A. I. R.* 1925 *Lah.* 471 ; (*F.B.*), *Foll.*

Simply follows A. I. R. 1925 *Lah.* 471 (*F.B.*).

See also Law Reporting Rules : *A.I.R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 193 (4)

(*Calcutta*)

CUMING AND B. B. GHOSE, JJ.

Shib Narain Kaibarta Das and *others*—Plaintiffs—Appellants.

v.

Abdul Gani and *others*—Defendants—Respondents.

Appeal No. 2414 of 1923, Decided on 11th December 1925, from the appellate decree of the Sub-J., Sylhet, D/- 25th September 1923.

Civil P. C., S. 100—*New plea—Questions of procedure dependent on facts cannot be raised.*

Questions regarding matters of procedure dependent upon facts cannot be raised for the first time in second appeal.

Common point : *A. I. R.* 1922 *Bom.* 233 ; 1925 *Cal.* 225 ; *A. I. R.* 1922 *All.* 124 ; 1923 *Cal.* 292 (2) ; 1924 *Bom.* 457 ; 1923 *Cal.* 247 ; 3 *L. L. J.* 165 ; 1922 *Lah.* 363 ; 1923 *Oudh* 14.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 194 (1)

(Oudh)

STUART, C. J., AND RAZA, J.

Subha Singh and *others*—Plaintiffs—Appellants.

v.

Rustam Singh and *another*—Defendants—Appellants.

First Appeal No. 36 of 1924, Decided on 30th April 1926, against the decree of the Sub-J., Sitapur, D/- 18th December 1923.

(*a*) *Custom—Ajit Mali Gaur Rajputs of Sitapur district.*

Among Ajit Mali Gaur Rajputs there is no custom that when the last member of one branch of a family dies and is succeeded by his widow, with the widow's estate, on the death of the widow the other branches take the estate in equal shares without regard to their being more or less remote in kinship to the deceased.

(*b*) *Wajib-ul-arz—Evidence is more reliable than oral evidence — Wajib-ul-arz recording succession as per Mitakshara—Strong evidence is required to prove contrary custom—Hindu Law.*

When it is not shown by reliable evidence that the Settlement officer neglected to perform his duty or was misled in recording a custom, and it does not appear that the statement of the custom is ambiguous, the record in a wajib-ul-arz of a custom is most valuable evidence of the custom, much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen : *A. I. R.* 1923 (*P. C.*). 70, *Foll.*

Where it is clear from the wajib-ul-arzes themselves that the Settlement Officer took trouble to ascertain the opinions of the leading members of the family as to what the customs of succession were, he recorded certain definite customs of succession, and in most instances recorded what should be the succession on the death of a widow :

Held : that his record that such succession is to be by the rules of the Mitakshara, and that there is no special custom in contravention of the rules of the Mitakshara Law should be given a very great value and it would require an overwhelming amount of evidence to establish the existence of a contrary custom in face of the entries in the wajib-ul-arzes.

(*c*) *Custom — Wajib-ul-arz not supporting custom—Custom set up against personal law—Oral evidence of no value—Custom cannot be held as proved.*

A family custom in derogation of the ordinary law cannot be supported on so slender a foundation. Where the wajib-ul-arzes not only prove nothing to support the alleged custom but actually disprove the existence of such a custom and the instances relied on as proving the custom are found to be of no value.

Held : the existence of a custom cannot be held as proved.

(*d*) *Custom—Tribal custom must be proved binding on ths family.*

There is no objection to a party pleading that a custom obtains both in a family and in the tribe to which that family belongs, but he must of course prove that the custom is binding on the family whether he confines his evidence and plea to the family or not : 8 *O. C.* 94, *Foll.*

(*e*) *Custom—Departing from ordinary law of succession must be strictly proved to be ancient and invariable.*

It is of the essence of social usages, modifying the ordinary law of succession that they should be ancient and invariable ; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends : 14 *M. I. A.* 570, *Foll.*

(*a*) *On facts.*
(*b*) *Simply follows A. I. R.* 1923 *P. C.* 70.
(*c*) *Too simple.*
(*d*) *Simply follows* 8 *O. C.* 94.
(*e*) *Simply follows* 14 *M. I. A.* 570.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal* pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 194 (2)

(Privy Council : From Calcutta)

29th June 1925

LORDS PHILLIMORE, CARSON, MR. AMEER ALI AND SIR JOHN WALLIS

Bhujendra Mohan Sarkar—Appellant

v.

Sukdeb Rathi and *others* — Opposite Party.

Privy Council Appeal No. 4 of 1924 from Calcutta Appeal No. 16 of 1921.

Privy Council—Concurrent findings of fact are not lightly disturbed.

When there are concurrent findings of fact it is only in very exceptional cases that the Privy Council think it their duty to allow the matter to be re-opened.

Common point See A. I. R. 1922 *P. C.* 105 ; 1922 *P. C.* 356 ; *A. I. R.* 1925 *P. C.* 174 (1) 1925 *P. C.* 122 ; 1924 *P. C.* 232 ; 1924 *P. C.* 113.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 195 (1)

(*Lahore*)

CAMPBELL. J.

Mohan Lal—Plaintiff—Petitioner.

v.

Sher Muhammad Khan—Defendant—Respondent.

Civil Revision Petition No. 716 of 1925, Decided on 22nd February 1926, against the order of the Sub-J., 3rd Cl. Hoshiarpur, D/- 20th August 1925.

Limitation Act, S. 12—Time requisite.

In an application for restoration of a suit dismissed for default, the time spent in obtaining copy of the order dismissing the suit for default cannot be excluded.

S. 12 is clear.

See also Law Reporting Rules *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 195 (2)

(*Madras*)

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

Sheik Muhammad Maracayar—Defendent 1—Appellant.

v.

Muhammad Ammal and *others*—Respondents.

Appeal No. 357 of 1923, Decided on 10th February 1925, from an order of the Sub-J., Negapatam, D/- 4th September 1923, in I. A. No. 543 of 1923.

Civil P. C., O. 32, Rr. 7 and 7 (1) (A)—Compromise by guardian on behalf of minor in partition suit—Guardian not applying for sanction—Pleader not filing certificate—Sanction on application of the defendants should not be given.

Pending a partition suit all the parties to it except one of the defendants entered into a compromise. The plaintiff was a minor and he was represented by a next friend. The next friend was also a party to the compromise. He changed his mind and failed to apply to the Court under O. 32, R. 7. for its sanction of the minor plaintiff. One of the defendants thereupon made the application. Plaintiff's vakil did not file in Court a certificate stating that in his opinion the compromise was beneficial to the minor. The next friend himself opposed the application made by the 1st defendant and stated to the Court that it was not in the interests of the minor that the compromise should be sanctioned.

Held : that the compromise should not be sanctioned.

On facts.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal* pp. 33, 41, 45, 53, 61, 69, 73 & 81.

A. I. R. 1926 Journal 195 (3)

(*Madras*)

RAMESAM, J.

Chinna Maricayar—Petitioner.

v.

Avva Nachial and *others*—Respondents.

Civil Revision Petition No. 147 of 1924, Decided on 12th March 1926, against the decree of the Sub-J., Negapatam, D/- 21st January 1925.

Succession Certificate Act, S. 4 (1)—Suit can be proceeded with but decree cannot be passed.

A suit to recover a debt due to a deceased person is maintainable without a succession certificate but a decree ought not to be given without the production of succession certificate in such a case.

Section clear. See also 17 *Mad.* 24 ; 14 *All.* 338; 18 *All. L. J.* 514 ; *A. I. R.* 1923 *Lah.* 597.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal* pp. 33, 45, 53, 61, 69, 73 & 81.

A. I. R. 1927 Journal 195 (4)

(*Oudh*)

DALAL, J. C.

Babu Lal and *another*—Defendants—Appellants.

v.

Rampher Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 36 of 1925, Decided on 14th September 1925, from an order of the Dist. J., Fyzabad, D/- 16th October 1924.

Limitation Act, S. 5—Delay in obtaining copy due to applicants not furnishing date of judgment cannot be excused.

An application for copy was filed on 26th May 1924 but the date of the judgment was not given so the stamp paper was returned on the 29th May. Subsequently another application with the same unused stamp was put in on 3rd of July 1924 and the copy was given to the applicant on 10th of July 1924.

Held : that the time taken for the preparation of the copy was clearly from the 3rd of July to the 10th of July and not from the 26th of May to the 10th July and the period between 26th May and 3rd July cannot be excused.

On facts.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal* pp. 33, 41, 45, 53, 51, 69, 73 & 81.

A. I. R. 1926 Journal 196 (1)

(*Lahore*)

BROADWAY, J.

Lathu Ram—Plaintiff—Appellant.

v.

Mohammad Din and *another*—Defendants—Respondents

Second Appeal No. 1412 of 1925, Decided on 4th January 1926, from a decree of the Dist. J., Sialkot, D/- 18th March 1925.

Limitation Act, S. 5—Pleader's mistake whether amounts to sufficient cause will depend on facts of each case.

Whether a mistake on the part of a pleader is or is not a sufficient cause for the extension of time will depend on the facts of each case (95 *P. R.* 1917 *Foll.*). Where a suit is deliberately undervalued in order to minimise the cost of litigation and as a result the appeal is filed in a wrong Court, the delay caused due to such mistake cannot be excused.

Simply follows 95 *P. R.* 1917 *and point is also simple.*

See also Law Reporting Rules: *A. I. R.* 1926 *Journal* pp. 33, 41, 45, 53, 61, 69, 73 & 81.

A. I. R. 1926 Journal 196 (2

(*Madras*)

VENKATASUBBA RAO, J.

Nomula Narasimha —Defendant — Appellant.

v.

Vasam Mangamma—Plaintiff —Respondent.

Second Appeal! No. 73 of 1924, Decided on 22nd April 1925, against the decree of Sub-J., Nellore, in A. S. No. 24 of 1923.

(a) ***Adverse possession—Possession*** *although not adverse at its inception becomes so when adverse claim is set up by some act.*

Unless adverse in the inception, possession will be presumed to continue as it began, yet this does not preclude the occupant from setting up an adverse claim at any time he chooses by any act which changes the character of his occupancy from amicable to adverse. *Rustomji's Limitation Act, page* 610 (*3rd edition*), *foll.*

(*b*) *Adverse possession—Limitation—Successive trespassers—Each derivative trespasser gets benefis of the period of his predecessor.*

A succession of trespassers claiming through one another can add and tack the periods of their possession so as to defeat the right of the owner by 12 years total possession. *Rustomji's Limitation Act page* 634 (*3rd edition*), *foll.*.

(*a*) *Simple point.*

(*b*) Common Point: See 44 *Cal.* 858 *P. C.*; 17 *C. W. N.* 748; 37 *Mad.* 440.; 18 *O. C.* 289.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 196 (3)

(*Madras*)

WALLACE, J.

Ramaswami Iyengar—Petitoner.

v.

L. Raghava Iyengar—Respondent.

Civil Revision Petition No. 341 of 1924, Decided on 20th November 1925, from the decree of the Small Cause Court J., Tanjore, D/- 10th October 1923.

Stamp Act, Sch. 1, *Art.* 1—*Unregistered acknowledgment—Court must find that it is executed for a particular purpose.*

In case of an unstamped acknowledgment of debt it is the Conrt's duty to record a finding whether or not the dominant idea in obtaining the docnment was to obtain evidence of the debt: *A. I. R.* 1924 *Mad.* 352, *Foll.*

Simply follows A. I. R. 1924 *Mad.* 352.

See also Law Reporting Rules: *A. I. R* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69 73 and 81.

A. I. R. 1926 Journal 196 (4)

(*Oudh*)

WAZIR HASAN, A. J. C.

Nand Lal—Defendant—Appellant.

v.

Debi Din and *others*—Plaintiffs—Respondents.

Sccond Appeal Ne. 8 of 1924, Decided on 13th August 1925, against an order of the Sub-J., Unao, D/- 13th November 1923

Malicious prosecution—Plaintiff must prove absence of reasonable cause.

In a case of damages for malicious prosecution the plaintiff must prove the absence of reasonable and probable cause: 8 *O. L. J* 147. *Foll.*

Simple point.

See also Law Reporting Rules: *A. I, R.* 1926, *Journal*, pp. 33, 41, 45, 53, 61, 69. 73 and 81.

A. I. R. 1926 Journal 196 (5)

(*Calcutta*)

NEWBOULD AND MUKERJI, JJ.

Arshed Ali—Accused—Appellant.

v.

Emperor—Respondent.

Criminal Reference No. 14 of 1924 and Criminal Appeal No. 621 of 1924, Decided on 25th November 1924, made by Addl. S. J., Backerganj, D/- 27-9-1924.

Criminal P. C., S. 374—*Confirmation.*

In a reference under S. 374 the High Court must be satisfied that the finding of fact is justified by the evidence on the record.

Simple point.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal* pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 197 (1)

(*Lahore*)

JAI LAL, J.

Pali and *others*—Accused—Appellants.

v.

Emperor—Respondent.

Criminal Appeal No. 227 of 1925, Decided on 6th April 1925, from an order of the 1st Class Mag., Ferozepur, D/- 7th February 1925.

Criminal Trial—Evidence of interested witnesses contradicted by others—Names of former not mentioned in first information report—Conviction on such evidence was not upheld.

Where a conviction is based on the evidence of interested witnesses whose names were not mentioned in the first information report as eye witnesses and whose evidence was contradicted by other witnesses on behalf of the prosecution.

Held: that a conviction on the evidence of such witnesses is not maintainable.

Simply on facts.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal* pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 197 (2)

(*Lahore*)

BROADWAY AND ZAFAR ALI, JJ.

Kanshi Ram—Plaintiff—Appellant.

v.

Baij Nath and *another*—Defendants—Respondents.

First Appeal No. 261 of 1922, Decided on 21st October 1926, from the decree of the Sr. Sub-J., Lahore, D/- 30th/31st October 1921.

(a) *Contract Act, S. 55—Equitable principle that substance of the agreement and not the letter should be looked to is covered—Although time for completion is fixed, intention to complete within reasonable time may be inferred.*

Section 55 does not lay down any principle which differs from those that obtain as regards contracts for the sale of land by which equity in such a case looks not at the letter, but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really intended no more than that it should take place within a reasonable time: 40 *Bom.* 289, *P. C. Foll.*

(b) *Transfer of Property Act, S. 55 (6) (b)—If earnest money paid is Rs. 100 or upwards, agreement to sell is compulsorily registrable—Registration Act, S. 17.*

Where earnest money has been paid to the amount of Rs. 100 or upwards, the agreement to sell becomes compulsorily registrable by virtue of the provisions of Cl. (6) (b) of S. 55: *A. I. R.* 1926 *P. C.* 94, *Foll.*

Simply follows: 40 *Bom.* 289 (*P. C.*) *and A. I. R.* 1926 *P. C.* 94.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 197 (3)

(*Lahore*)

ZAFAR ALI, J.

Sodagar Singh—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 945 of 1926, Decided on 6th December 1926, from the order of Magistrate, First Class, Kasur, D/- 6th July 1926.

Penal Code Ss. 366 and 457—Abduction.

Where the accused was charged under Ss. 366 and 457 and the following facts were found, viz., that the woman alleged to be abducted was of a bad character; there was no mark that she was bodily removed as alleged, the accused was a married man having a young wife and the complainant bore him a grudge on account of a previous incident and further the evidence of the complainant was found to be unreliable.

Held: that the accused could not be convicted.

On facts.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal* pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 197 (4)

(*Lahore*)

FFORDE AND ADDISON, JJ.

Mt. Muhammad-Ul-Nisa—Plaintiff—Appellant.

v.

Hukum Chand-Jagadhar Mal and *another*—Respondents.

First Appeal No. 742 of 1925, Decided on 5th July 1926, from the decree of the 1st Class Sub-J., Delhi, D/- 26th February 1925.

Civil P. C., O. 17, R. 3—Time not granted to produce evidence—Suit cannot be disposed of forthwith for failure to produce evidence.

Where time has not been granted to a party to produce his evidence, his failure to produce it does not empower the Court to dispose of the suit forthwith under O. 17, R. 3.

Point covered by the section (before amendment) and after amendment no good law.

See also Law Reporting Rules: *A. I. R.* 1926 *Journal*, pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 198 (1)

(*Rangoon*)

MAUNG BA, J.

Ma Ngwe Yun and *others*—Appellants.

v.

Ma Pu and *others*—Respondents.

Second Appeal No. 360 of 1926, Decided on 7th December 1926, from the Decree of the Dist. J., Magwe, in Civil Appeal No. 10 of 1926.

Limitation Act, S. 5—Bona fide mistake of pleader may be sufficient cause—Bona fide, explained.

A bona fide mistake on the part of a pleader may be sufficient cause within the meaning of S. 5. But no mistake is bona fide unless made inspite of due care and attention : *A. I. R.* 1927 *Rang.* 20, *Foll.*

Simply follows A. I. R. 1927 *Rang.* 20. See *also A. I. R.* 1922 *All.* 490 (*F. B.*) ; 1924 *Bom.* 399 ; 1923 *Lah.* 402 ; 1925 *Mad.* 462 (1) ;

See also Law Reporting Rules : *A. I. R.* 1926 *Journal* pp. 33, 41, 45, 53, 61, 69, 73 and 81.

A. I. R. 1926 Journal 198 (2)

(*Rangoon*)

OTTER, J.

Nga Ngwe Kyi—Accused—Applicant.

v,

King-Emperor—Opposite Party.

Criminal Revision No. 1264-B of 1926, Decided on 12th November 1926, from the judgment of the Dist. Mag, Sandoway, in Criminal Appeal No. 26 of 1926.

Burma Gambling Act, (17 *of* 1899), *S.* 1, 2 and 3 (1)—*Gaming house defined.*

A house where instruments of gaming are kept for the profit of the the owner of that house, is a common gaming house.

Completely Covered by S. 3 (1) *and* 12.

See also Law Reporting Rules : *A. I. R.* 1926 *Journal* pp. 33, 41, 45, 53, 61, 69, 73 and 81.

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THE

ALL INDIA REPORTER

1926

JOURNAL SECTION.

NOTES AND COMMENTS.

The New Year.

This issue will carry to the thousands of our readers our greetings and best wishes for a happy and prosperous New Year. We regard each New Year Day as a milestone on our path of progress. The sight of a milestone creates in the mind of the weary pilgrim mixed feelings. There is the feeling of joy that so much distance has been covered and the heat and the dust and the ruggedness of the road have been all left behind. There is also the feeling of hope of approaching the goal and a clear perception of the strenuous effort that has to be put forth before the goal is reached. We realise what difficulties we had to overcome in the course of our career for the last four years and our heart swells with gratitude to the legal profession in this country for the great encouragement and the warm sympathy which we have been receiving from them uniformly. We also feel that much work still lies ahead. In the matter of the revision of the curricula of legal studies and the methods of legal education in this country, in the matter of the inauguration and development of an indigenous unified All-India bar, in the matter of far-reaching and beneficent legal reforms suggested by the report of the Civil Justice Committee, and last but not least in the matter of obtaining an immediate reduction of the enhanced Court fees that were imposed as a post-war fiscal measure very much sustained practical work has to be carried out without any delay by those interested in the welfare of the bar and in the maintenance of a pure and enlightened system of administration of justice. Another matter of the utmost importance to the bar is the organisation of efficient and active Bar Associations in every place small or big. These are only some of our most pressing problems. In past years we have striven our utmost to place before our readers and before those whom it may concern what we conceive to be the sound lines of advance. In the year to come concrete proposals on many of these matters are likely to be brought on the legislative anvil. We hope with the kind assistance of the members of the bar and the learned judges of our Courts, we shall be able to discharge our heavy responsibilities in the matter of law reform and other matters to the entire satisfaction of all concerned.

We take this occasion for thanking those lawyers who have placed in our hands for publication in these columns their learned contributions on legal topics. We shall be most happy to receive and publish original articles on any topic of law which may be of interest to our readers.

Now that our readers are numbering so many thousands, may we not hope that an appeal made to them through our columns will help in a large measure the proper organisation of the bar? It is our fervent wish that every Bar Association, be it big or small, should take a lively interest in all matters concerning the welfare of the bar and the proper administration of justice. We repeat that we shall be most happy to publish in our columns the resolutions and brief reports of proceedings of Bar Associations all over the country. We fervently hope that the year to come will witness substantial improvements in the law for the benefit of the bar and the litigant public.

VAKILS AND SUITORS' MONIES IN THEIR HANDS.

Recently a special bench of three Judges of the Madras High Court had to consider the conduct of a certain Vakil of the High Court in respect of allegations made by a certain client that monies which were entrusted with the Vakil for payment into Court by the client were not so paid and were utilised by the Vakil for his own purposes in violation of his duty to the client. After a very full enquiry the learned judges came to the conclusion that the Vakil concerned did utilise his client's monies for his own personal purposes and that thereby he was guilty of unprofessional conduct. In view of this finding the learned judges directed that the name of the Vakil be struck off the rolls of the High Court. Some months back the Madras High Court had under similar circumstances directed that the name of another High Court Vakil practising in the Moffusil be struck off the rolls of the High Court. There was a similar instance of unprofessional conduct some time ago and the Allahabad High Court had to deal with the Vakil concerned in the exercise of its disciplinary jurisdiction. More recently a High Court Vakil in Madras was found guilty of criminal breach of trust by a Magistrate and was convicted. Against the conviction a criminal revision petition has been preferred to the Madras High Court and the matter is now pending in the High Court.

These incidents call for a certain amount of self-examination at the hands of the Bar. The relationship between the client and his Vakil is of the utmost fiduciary character. In this country the Vakil has been upholding the highest traditions of the Bar and the implicit confidence reposed in the Vakil by the client has been most well deserved. A good deal of the influence which the Vakil till recently possessed in public affairs was largely due to the very high level of rectitutde and uprightness uniformly maintained by the Bar all over the country. Unfortunate incidents such as those that have come in quick succession recently, though occasional and uncommon, result in causing a great deal of injury to the Bar. Persons of a particular class who are not always friendly to the lawyer take advantage of such incidents to refer to lawyers as a class in words far from complimentary. For some time at any rate the standard of confidence is lowered and clients begin to deal with their Vakils with a little more caution, if not mistrust.

Both from the point of view of the dignity and the prestige of the Bar and the legitimate interests of the litigant public any lessening of the trust ordinarily reposed by the client in his Vakil will be most prejudicial to Vakils as a class and to the sound administration of justice. Whenever a brother member of the Bar is felt to be transgressing the bounds of propriety, we think, it is the duty of the senior members of the Bar in the locality to intervene before it is too late and prevent the commission of any wrong act. We also believe that in every locality there ought to be sufficient public opinion among the members of the Bar which ordinarily members of the Bar would respect. We are aware that we are treading on very delicate ground, and we say this with all respect that if there is healthy and useful activity in local Bar Associations, there will be created and maintained sound public opinion which would help to maintain the best traditions of the Bar. It is from this point of view that some time back we advocated in our columns the proper organisation and functioning of Bar Associations all over the country. We repeat the hope that in the year before us a large number of our Bar Associations which are dormant will begin to function efficiently to the advantage of all concerned.

Under the single agency system that prevails in this country and which is now admitted to be the goal in the Report of the Indian Bar Committee, the Vakil combines in himself the position of an Attorney and the position of an Advocate. The relationship between the client and the Vakil so far as the latter's handling of the former's monies in connection with a suit is concerned is that of principal and agent. It is the duty of the Vakil to account to his client for monies received from him as outfees for the conduct of the suit. It is therefore the duty of the Vakil to keep proper accouuts of suitors' monies received in his office for the conduct of suits and proceedings. If separate accounts are maintained and suitors' monies are separately kept without being mixed up with the Vakil's own monies, the deplorable lapses that

sometimes occur would become absolutely impossible. Such regular accounting would promote the efficiency of the Vakil's office and must be welcomed by the clients. In the valuable lectures on **Professional ethics** delivered by the late Mr. Justice Sundara Ayyar, he laid special emphasis on this aspect of a Vakil's duty. We have to admit with great regret that there is still plenty of room for improvement in this matter.

A Vakil who has not much work may think that there is not sufficient money passing through his hands to require the maintenance of separate accouts. This view is wholly unjustifiable. More work or less work, it is desirable and it will be found very helpful that a Vakil should maintain separate accounts for the out-fees received from the clients and should keep suitors' monies separately without mixing them up with his personal monies. We should not have referred to this matter at such length but for the feeling that in many Moffusil centres there has to be considerable improvement in the manner in which the accounts are maintained in the offices of Vakils. The responsibilities of the Vakil are very heavy. We believe that the maintenance of proper accounts would be a valuable aid in the proper discharge of this responsibility. The growth of healthy public opinion among the members of our Bar Associations and the maintenance of correct office accounts by vakils, will be sufficient guarantees for the maintenance hereafter as heretofore of the high level of rectitude and professional honour which must be dear to all well-wishers of the legal profession.

ARTICLES.

Defects in the Court Fees Act. — (Chunni Lal and others *v.* Sheo Charan Lal Lalman, 1925 All. 787 = 23 A. L. J. 725)—By Jyoti Swarip Gupta, Vakil, High Court, Allahabad.

Accuracy and precision are the soul of statutory enactments. It is the paramount duty of the mere layman as of the greatest legislator lawyer and judge to see that the Acts and sections say precisely and accurately what they are meant to convey. All defects in drafting and looseness of expression in the statutory law of the land should be forthwith removed. It is for this reason that I am glad that a division bench of the Allahabad High Court consisting of Sulaiman and Boys, JJ., has pointed out certain defects in the Court Fees Act. It will be my endeavour in this article to point them out and suggest suitable amendments in the hope that the Government or some non-official member will move an amending bill to correct the defects of draftsmanship in the Act.

(i) The headings of Chapters II and III are real misnomers which will be patent even to the layman. It is really not at all necessary to seek the aid of a judicial pronouncement to point them out but as it has a charm and weight all its own and as it has been so well and concisely put by Sulaiman, J., that I may as well quote from his judgment:—

"....Chapter II has the heading 'Fees in the High Courts and in the Courts of Small Causes at the Presidency Towns.' This obviously applies to all High Courts, as s. 5 of this chapter is invariably applied to the High Court other than those at the Presidency Towns. Chapter III has the heading **Fees in other Courts and in Public Offices.** If these headings were to be accepted as accurate, it would seem that Chapter III does not relate to matters pending in High Courts at all, but we find that ChapterIII contains many important sections, which have invariably been appliedto appeals filed in the High Courts. I may refer to the methods of calculating amounts payable under the ss. 7 & 8 of that chapter, the decision of the question as to valuation under s. 12, the power to order refund of fee paid on memorandum of appeal under s. 13 as well as other sections of Chapter III. Courts have invariably applied these sections contained in Chapter III to appeals pending in High Courts though there is no specific provision in the Act under which these sections are made applicable to appeals in the High Court and though the heading of that chapter points to a contrary direction."

Thus the headings of both second and third chapters convey an entirely wrong idea. Sulaiman, J., was forced to observe :—

"But it is well known that in construing a statute the headings are to be ignored and it is only the sections which the Court sare called upon to interpret as being the substantive part of the enactment. I must, therefore, in accordance with the uniform practice of all High Courts, hold that the principles contained in s. 7 of Chapter III are applicable also to appeals before the High Courts."

I would propose that the second and third chapters should be amalgamated. The ss. 3 to 19 under both the chapters would then be comprised in the chapter which will be numbered 'Second'. Its heading can conveniently be **Fees in Courts and Public Offices.** In that case Chapter III

—A would be plain Chapter III and the necessity of re-numbering subsequent chapters would be avoided.

(ii) In the ninth paragraph Sulaiman, J., says :—

"Another anamoly is that the opening portion of s. 7 relates to suits and yet there is no other section in the Act which says that principles governing suits will also govern appeals."

This defect can be got rid of by the addition of a clause numbered 7-A which may run as follows :—

"7-A. The amount of fees payable under this Act in appeals shall be computed on the amount of value of the subject matter in dispute and where such amount or value cannot be ascertained the principles governing suits shall govern appeals."

(iii) A little further Sulaman, J., observes:—

"And, lastly, although sub-cl. (4) refers to plaint or memorandum of Appeal, the last two lines of that sub-clause refer to the plaintiff and do not expressly mention the appellant."

I would venture to suggest that the words "or appellant" should be inserted between the words "plaintiff" and "shall" in the closing paragraph of s. 7 sub-cl. (4).

I am afraid this suggestion will not be as plain sailing as the other suggestions have been. The earlier defects were plain enough. Anybody who reads the act even as one reads a novel could detect those anomalies. But this last point is a very debatable point, the views of the different High Courts differ from one another and it is rather difficult to know what the legislature meant and still more difficult to say as to what it should mean.

The main question which arises in considering this change is whether it should be open to the defendant to put a valuation different from that put by the plaintiff in the plaint. The Madras, Punjab and Calcutta High Courts answer this question in the negative while the Allahabad and the Patna High Courts always felt inclined and the former has now definitely answered this question in the affirmative. The Full Bench of the Madras High Court following an earlier case (*Samiya Mavali* v. *Minammal*, 33 M. 490) has held in *Dhupati Srinivasa Charlu* v. *Perindevamma*, 39 M. 925 (which was a case of appeal from a preliminary decree in a suit for accounts) that in cases where the subject matter in dispute is not capable of being valued exactly, the plaintiff's valuation must be accepted and the defendant respondent should not be permitted to alter it at subsequent stages. As remarked by Sulaiman J., this cannot be accepted in its widest scope for it is well known that if the plaintiff has valued his claim at a certain figure but the decree passed by the first Court is for a smaller amount, the defendant in appeal is not bound by the valuation in the plaint. The Punjab High Court in the case of *Kanjimal* v. *Panna Lal*, 28 I. C. 262 and the Calcutta High Court in the case of *Banwari Lal* v. *Daya Shankar Misser*, 13 C. W. N. 815 has inclined towards the same view.

On the other hand the *obiter dicta* in *Bhola Nath* v *Parsotham Das*, 32 A. 517 support a contrary view. *Kankaiya Lal* v. *Seth Ram Sarup*, 44 A. 542=A. I. R. 1922 All. 228 and *Kuldip Sahai* v. *Hari Har Prasad*, 4 Pat. L. J. 639 following the *Allahabad* case also held that the view of the Full Bench of the Madras High Court was not correct. As pointed out by Sulaiman, J., these two last cases are slightly distinguishable because in those cases, the defendants had not appealed from the whole decree but had admitted their part liability. Thus the identity of the subject matters in the first Court and in the Court of Appeal was not the same, and it can be said that as there was no valuation by the plaintiff of the subject matter in dispute in appeal, defendant could value it according to his own estimate.

The difficulty which confronts us could be better appreciated and solved by studying the language of the section of the Court Fees Act a little closely trying to grasp the principles which underlie it. It would be observed that in all the ten clauses of s. 7 with the single exception of cl. (4) the legislature has prescribed an *ad valorem* system or some guide for calculating the valuation which is independent of the sole volition of one of the parties. But the nature of the suits comprised in the six sub-clauses of cl. (4) renders it either impossible or extremely difficult to lay down any guide for calculating valuation. This seems to be the reason why the legislature left it to the plaintiff to value the relief, at the amount he chooses. In case of suits to recover title deeds, or for an injunction or for an easement all of which come under cl. 4, it is impossible to name any except a fancy value. In suits to enforce a right to share in joint family property or for accounts, it would be very

difficult for the plaintiff to fix the valuation. Thus as pointed out by Sulaiman, J., it must be conceded that in cases coming under s. 7 (iv) the valuation made by the plaintiff is often an arbitrary one and particularly in cases falling under one sub-clause the valuation is a tentative one, it not being known at the time of filing the plaint as to what would be the exact amount found due after the account is taken. If under such circumstances, the plaintiff fixes a figure arbitrarily and haphazardly according to his liking, there is no just ground why the defendant when appealing should be tied down to this haphazard estimate when on the face of it the valuation is merely tentative. Why should the man who first starts the litigation be given the advantageous position of regulating its future course and selecting his vantage points to the detriment of the defendant. He may if the defendant is poor put it at such high value that it may be well nigh impossible for his adversary to file an appeal. As remarked by Boys, J., the provision that the "plaintiff shall state the amount" is merely in order to give a *starting point* and not with any intention one way or the other, that it should or should not govern the appeal.

It follows as remarked by Sulaiman, J. "that in cases where the valuation has of a necessity to be arbitrary and tentative, the person who has to present a petition of plaint or appeal and who is called upon to pay the necessary Court fees will have to fix the valuation and unless the Court is of opinion that the valuation has been put down fraudulently, it will be difficult not to accept the valuation so made."

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*. Grant of Pardons Outside the Criminal Procedure Code—By E. S. Sunda, B.A., B.L., Vakil, Madura.

The case reported in 1925 Nagpur 313 (1) *Chandekar case* is not remarkable for anything in itself but it deserves our notice as one that tries to follow 1923 Allahabad 91 (2) in its verdict regarding pardons outside the Criminal P. C. Of course the Nagpur Court has not chosen to raise and meet the legal principles concerned in the matter for the very obvious and convenient reason that the appeal grounds "*did not raise any legal point*" (page 317). One would have greatly desired the Court taking a stricter view of the law and trying to meet this all important question which after all did not remain completely unnoticed by the appellant's Counsel. It was raised probably without the full dress paraphernalia of a ground of appeal. On page 316 second column these words do occur :

> "Then the Counsel commented on what he termed the *peculiar course of giving* four persons, *assurances that they would not be prosecuted.* It is contended that this creates a dangerous precedent, for if these four persons combine they can establish anything".

This was probably not enough and Chandekar had to share the fate of his brother-sinner Har Prasad Bhargava, though in his case all the points were specifically raised.

These two cases are those of bribery in which a Subordinate Judge (Allahabad case) and a Thasildar (Nagpur case) stood charged. The Local Government published a notification that no prosecution would be instituted against any person who came forward with evidence that he had paid or offered a bribe to Har Prasad Bhargava or Chandekar. Some people did come forward and their evidence was admitted. The points that arose in consequence were:—

(*i*) Whether the evidence of these persons could be taken as witnesses—accomplices in the crime on their own testimony—as the cases did not fall under the provisions of s. 337 of the Criminal P.C. —and as there is no other provision under which the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence under inquiry could be admitted.

(*ii*). It is not lawful to administer an oath to these people under s. 5 of the Indian Oaths Act— as the persons in the Allahabad case were "accused" in the complaint presented in Court.

(*iii*) That the said notification by the Government was illegal and that no evidence obtained in consequence or tendered on the strength of such a declaration was legally admissible.

Point No. 1 :—The Allahabad Case answers the objection by stating :

(*a*) that s. 337 is an empowering section and has nothing to do with the powers and discretion of the executive authority such as the Local Government (1923 Allahabad at p. 106).

(*b*) that the s. 337 has no application to s. 161 of the I. P. C., (1923 Allahabad at p. 106).

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* This article deals with only one aspect of the question. We shall deal with the subject in our next issue.—"Ed.".A. I. R.

(1) *Anant Wasudev Chandekar* v. *Emperor.*

(2) *Emperor* v. *Har Prasad Bhargava* 45 All 226=21 All.L.J. 42; 25 Cri.L. J. 497=1923 All 91.

(*c*) There is no provision of Indian Statute Law, nor is there any principle of natural justice, which makes an accomplice, an incompetent witness at the trial of another person in respect of the offence in the commission of which he was an accomplice.

(*d*) a refusal to admit the evidence as he was an accomplice and outside the purview of s. 337 would be a clear error of law.

The contentions of the Allahabad Court are not without force though they are not insurmountable:

(1) *The point* (*b*) that s. 337 has no application to s. 161 of I. P. C., is of no significance. In fact s. 337 has no application to several other sections of the I. P. C. The question should be not whether the Local Government is prohibited from granting pardons to persons for offences not stated in the s. 337 but whether the *Legislature intended at all the grant of pardons in the case of other offences* and as *the granting of pardons in the case of other* offences is expressly negatived (as they are not given in the section) whether the *Local Government can give* the same leaving aside for the moment its jurisdiction to give.

The logical conclusion and termination of the position of the Allahabad High Court will be that pardons can be granted in the case of all offences not included in s. 337! So the word or privilege technically called pardon, amnesty or shield against prosecution is and can be given in all offences! This takes us to the point raised in (*a*) above.

(2). The point (*a*) *i.e.*, that the discretion of an executive authority cannot be affected by s. 337. This is arguing on a wrong basis. It is as good as the claim of a private party that s. 337 cannot interfere with his privileges of granting pardons. The difficulty comes in when it affects other guilty persons in the case. The Allahabad Court should have gone further and looked into the legal clothing this act of the Local Government gives to the pardoned. If the Local Government gives the pardon, *let it and let it do it bound by the Crim. P. C. which it ought to follow if it wants to prosecute* anybody at all. It is not for the *prosecutor to claim certain powers within himself* and try to set at nought the procedure prescribed for a Court of law and justice—whether the prosecutor be a Government or a private party—*and a Court to which it comes for getting justice.* The discretion is really restrained, if it wants to do anything:—(i) *beyond or* (ii) as *not stated in the Criminal Procedure Code.*

This takes us to

(3). *Points* (*c*) & (*d*) :—Admission of evidence.

The Allahabad Court loses much of its force in its own arguments when it is prepared to concede in page 107 of 1923 Allahabad,

"The real effect of the argument addressed to us on behalf of the accused on this point is that there is a method by which *the prosecution keeping within the four corners of the Code of Criminal Procedure Code, might with the consent of the Court have put Bhagirath and Mangal Chand* into witness box—against Har Prasad Bhagava, each of them fortified by a *judicial order of acquittal* which would have barred their subsequent prosecution."

But it unfortunately misses the issue in the case when it glides into saying at page 107—"Whether their testimony is entitled to greater or less credit on this account is a question to be considered but has nothing to do with the admissibility of the testimony". With great respect to the Allahabad High Court, it should be stated it makes all the difference in the world by allowing the evidence to go in. The mentality of the hardened approver—with a pardon announced extra judicially long before the case is before Court to protect him—is not that of the erst-while accused entering the witness box. As in the case of many prosecutions—especially sensational prosecutions—it is not unreasonable to think of *prepared* approvers appearing in the trial with a good deal of matter pumped in and pumped out. Besides who can deny the effect of a stay in the docks—however short it is—on an abettor-accused turning into an approver. Is he not different from the nonchalant extra judicial approver appearing as a witness—as honourable probably as any other respectable prosecution witness of his gang? The attitude, mentality, the fear of the consequences, the position he is placed in, are all contributing factors to the witness speaking out the truth. The Legislature—why even common sense and Common Law—would not tolerate the pardon announced by a proclamation to an abettor if he only gives out the name of the principal offender and adduce evidence against him in a trial! We would go further and we are entitled to ask for.

(i) the procedure adopted in this granting of extra judicial pardons,

(ii) the penalty if any *if the pardoned do not behave properly in the trial.*

Is the Local Government again going to arrogate to itself and is the Allahabad High Court going to grant them powers to

penalise the approvers—a procedure contemplated in the S. 339 Cr. P. Code. Here again there is wide difference between a judicial and extra judicial pardon. In the cases of judicial pardons, the approver is not perfectly free. The Democles sword of a Public Prosecutor's certificate that he acted dishonestly as a witness paving the way for a further prosecution of himself is still hanging over his head but in the case of extra judicial pardons, we have yet to learn from the Local Government concerned in these cases what penalty they seek to impose. For what we know there are none. This act of pardoning, again gives place to a conflict in procedure. Suppose the extra-judicially pardoned are to be penalised, how, of what offence and under what procedure? We feel the Allahabad High Court and the Nagpur Court are setting up conflicts when there are none, by their two cases.

Besides what is pardon? As understood ordinarily, it is a mercy shown by a Judicial Officer or it may be an appeal to a King's *pardon after conviction*. Now we are informed of a pardon before trial with no responsibility or penalty. This is not founded on any statute.

Strange situations may crop up under this system of extra judicial pardon. Suppose a complaint is presented to a Magistrate against the very individual enjoying the privilege of an extra judicial pardon. Is the Magistrate to take the case on file and enquire, and what should be the procedure in or disposal of such a complaint? Or should the Magistrate bow his head—inspite of his being a Judicial Officer of the realm—to the D.O's or mandates of the Local Government—" Don't investigate" or how long should he keep the complaint pending? Under what powers can the Local Government oust the jurisdiction of the Magistrate and lift this virtuous soul of an approver above the clutches of the Magistrate? Or should the approver face an enquiry inspite of the shield? Is the Magistrate to obey the High Court or the Local Government, what ever it is. This takes us to the question of the separation of the Judicial and Executive functions and this question of extra judicial pardon is an addition to the already tangled well.

Is not the Local Government, in the position of a prosecutor, also doing judicial duties by granting pardons to persons that come forward as abettors? How can the judge be a prosecutor or *vice versa*? How is the evidence of those persons (pardoned) to be made use of?

Another point that ought to be noted is that in all cases the prosecuting party cannot do *every thing* in its own way. There are cases which, if set in motion, cannot be stopped even by the party. In non-compoundable cases how can a prosecuting party in a Criminal Court enter into a compromise with the accused? The powers of a prosecuting party are limited in the case of certain offences.

The Allahabad High Court would labour to explain: *Banu Singh* v. *Emperor*, 33 Calcutta 1353 and *Govinda* v. *Emperor*, 16 Nagpur Law Report 9 where *the power of Local Government to grant pardons is expressly negatived*. No conditional pardon can be given to an accomplice for the purpose of his examination. They would hold that the facts in 33 Calcutta 1353 are sufficiently distinguishable; and we can only say that the Allahabad High Court though faced with a judgment against their view would not meet it, nor explain it, still they would say that the facts were different. We feel unconvinced.

Again the power to turn the accused into an approver is a judicial act of a person sitting in open Court; and can never be the *fiat* of an executive authority. Even in the ss. 494 or 337 the words "*with the consent of the Court*" and "*The District Magistrate, Presidency Magistrate, a Sub-Divisional Magistrate or any Magistrate of the first class.....tender a pardon,*" appear making clear that the pardon is an act of a Court. One feels that the Allahabad High Court has minimised the mischiefs of the serious illegalities in the case. Even s. 537 of the Criminal Procedure Code may not cure such illegalities. We surely feel that the conviction of Har Prasad Bhargava on the basis of the accomplices' evidence is neither legal nor equitable. It would have been barest—justice, had their Lordships of the Allahabad High Court felt the seriousness of the case, if they had ordered a *de novo*—inquiry without the evidence of the virtuous approvers. In any case the setting aside of the order of acquittal, by the Allahabad High Court coupled with a sentence against Har Prasad Bhargava astounds us and we would not be surprised that if the matter is

properly placed, they would change their verdict.

We feel that the Allahabad High Court in their generous spirit can even decide the point as a case stated before them instead of allowing other persons to suffer under this judgment which may be revised by the Judges themselves at a second sitting. In any case it shall be our duty to protest against the speedy copying of this judgment by the other High Courts, as was done by Nagpur Judicial Commissioner's Court.

As I finish, I am told of a bill by Mr. Amarnatha Dutt, M.L.A., to insert a clause in Criminal Procedure Code in s. 337 "that a conditional pardonal shall not be tendered to an accomplice in any *manner not provided for in that section*" I am not in possession of the Objects and Reasons and I would not be surprised if it (the amendment proposed) results out of 1923 Allahabad 91. I welcome the Bill and it shall be duty of the Legislators to support it right through.

REVIEWS OF BOOKS.

The Case noted Indian Succession Act (39 of 1925)—Published by Madras Law Journal Office, Mylapore, Madras, 1925, Price Rs. 2.

The new Indian Succession Act repeals as many as eleven enactments of the Indian Legislature. Among the repealed enactments are the Indian Succession Act of 1865, the Hindu Wills Act of 1870, the Probate and Administration Act of 1881, and the Succession Certificate Act of 1889. The new Act is, therefore, of the greatest importance as embodying the law of Intestate Succession and Testamentary Succession in British India. Incorporation of provisions relating to the grant of Probate and Succession Certificates makes the Act specially important for constant reference. The Madras Law Journal Office has earned the gratitude of the profession by the promptness and the thoroughness with which the profession is supplied with such important Acts within a very short time of their enactment and promulgation. The cases noted as footnotes to the various sections are not only from the Indian Reports. References to English cases are also very freely given whenever necessary. We are sure this edition will be found exceedingly useful by the Bench and the Bar. The marginal notes giving in thick type the corresponding sections of the repealed enactments will be found specially helpful. The book is very attractively got up and bound.

Trial of Ronald True.—Edited by Donald Carswell, of the Middle Temple, Barrister-at-Law. Notable British Trials Series Published by Butterworth & Co. (India) Ltd., Calcutta.

The latest addition to the famous "Notable British Trials Series" is specially welcome from the point of view of the lawyer. The introduction gives in the form of a lucid and interesting narrative the career of Ronald True indicating the influences and events which may throw light upon some aspects of True's case. The book gives a full and detailed report of the entire proceedings from the stage of the framing of the charge to the stage of the Jury's verdict and the Judge's sentence. The record of the evidence of the witnesses forms very instructive reading. The debate on the questions for the jury and Mr. Justice M'Cardie's charge to the jury will be very profitable reading to those who are not quite familiar with the working of the Jury system in England. The full report of the proceedings in the case will enable the reader to appreciate the innumerable medico-legal difficulties raised by the plea of insanity as a defence. It is well-known that a hot controversy on the medico-legal questions involved in the case was raised in the press. This led to the appointment of a committee by the Lord Chancellor to consider what changes, if any, were desirable in the law, practice and procedure relating to criminal trials, in which the plea of insanity as a defence is raised. Very eminent lawyers served on the committee which was presided over by Lord Justice Atkin. The Committee's Report is reprinted as appendix IV. The pathetic details of True's life-story forms very sad reading and exemplify the saying that sometimes truth is even stranger than fiction. A record of such trials in a permanent form is valuable as a guidance to succeeding generations of lawyers as to how such questions were tackled and dealt with by their forerunners at the bar. The book printed in England in excellent style with excellent portraits of those connected with the trial will be a valuable addition to every lawyer's library.

Articles.

THE INDIAN BAR COUNCILS BILL, 1926 (BILL NO. I OF 1926).

BY MR. E. VINAYAKA ROW, B.A., B.L., *Vakil, High Court, Madras.*

The Indian Bar Councils Bill is now published in the Gazette of India and the Provincial Gazettes for the information of the public. The Bill has so far evoked no enthusiasm at all. If the Bar has not entered an emphatic protest against the disappointing and humiliating provisions of this Bill, it is due entirely to the fact that the Bar in India is at present somewhat lethargic and disorganised and has not yet appreciated the wisdom of the adage about bolting the door before the horse is stolen. We hope that at least before the end of February every Bar Association would have assembled and considered dispassionately the provisions of the bill. Without the pressure of strong public opinion it is most unlikely that any beneficent results will accrue to the Bar as such by this piece of legislation.

The present occasion is very unique. After the persistent efforts of lawyers like Mr. K. C. Neogy, Mr. Agarwala and Dewan Bahadur T. Runga Chariar, the Government were pleased to appoint the Indian Bar Committee in 1923 whose report has been already considered in these columns (*vide* All India Reporter, 1924, Journal Section, page 63). The Committee toured round the country and the profession must be grateful to the Hon'ble Mr. T. Runga Chariar and his colleagues to the progressive parts of their report. There was a battle royal between the protaganists of the single agency and the double agency and we are afraid the result was a draw. We ventured to think that, after all, the halting recommendations of the Bar Committee would at least be accepted *in toto* by the Government of India and that, as a result of public opinion, they would further amplify and improve the provisions in the direction of creating an autonomous Indian Bar, whether on an All India basis or on a Provincial basis. We very much regret that the Government of India have entirely disappointed us. The provisions of the present bill are, in our opinion, very unsatisfactory. If the provisions are not going to be amended in a liberal spirit, we are afraid it is much better to leave matters as they are without any more ado about conferring unreal and ineffective powers upon the Bar Councils. We have been asking for the substance. In answer, we are given a sham and a shadow.

The present is a chance which must not be missed by the Bar. If the present bill is passed into law, as it stands, there will be no possibility for a long time to come to persuade the Government to take up an amending piece of legislation on this subject. We, therefore, desire that every Bar Association in the country should scrutinise the provisions of this bill now published in all the provincial gazettes and they should submit resolutions of protest making specific recommendations for amendment to the Government of India and the resolutions should be published in the daily press. Members of the Legislative Assembly should be fully equipped with all the details to safeguard the interests of the Bar and to enact a statute which will be worthy of the legal profession in this country.

Preamble.

The preamble admits that the object of the bill is to provide for the constitution and incorporation of Bar Councils for certain Courts in British India, to confer powers and impose duties on such Bar Councils, and to consolidate and amend the law relating to advocates of such Courts. Let us now examine the provisions of the bill with a view to find out the extent to which the abovesaid objects have been achieved and also whether the provisions of the bill are sufficient to satisfy the just and reasonable aspirations of the Bar in this country.

Bar Councils and High Courts.

Clause I makes the Act applicable to the whole of British India. One would expect that the idea of making the Act applicable on a territorial basis would be kept up; but the same clause makes it

clear that these Bar Councils will be constituted only for certain Courts. The idea of territorial legislation is given up. Bar Councils are constituted practically as departments attached to the offices of the High Courts mentioned in this clause. For the present, Bar Councils will be constituted only for the High Courts of Judicature at Fort William in Bengal and at Madras, Bombay, Allahabad, Patna and Rangoon. The Governor-General in Council is empowered to notify which other Courts will have the Bar Council Department attached to them. This means that, for the autonomy, emancipation, and independence of the Bar in Lahore, Nagpur, Karachi and Lucknow, they must wait for the issue of the Governor-General's notification. The conditions for the issue of this not having been laid down, we see no reason why these places should be left out in the cold. May we not repeat our suggestion that, until Nagpur and Lucknow are found fit to have Bar Councils of their own, Nagpur may be tacked on to the Bar Council at Bombay and Lucknow to the Bar Council at Allahabad. The separation can be effected, when, in the opinion of the provincial Bar Councils and the Governor-General, the time is ripe for the constitution of Bar Councils at the aforesaid places. As far as Lahore is concerned, the position seems to be somewhat unfortunate. The report of the Indian Bar Committee did not take a very hopeful view of the position in Lahore. They observe,

> "in fact it was generally admitted that under the conditions now existing there, a Bar Council at Lahore would not function at all, unless it were entirely controlled and guided by the Bench."

The Bill may give our Lahore brothers the Bar Council which, in the opinion of the Bar Committee, would function under the proper control and guidance of the Bench. In fact, the bill does not give to other provinces any better Bar Council than what was suggested by the Bar Committee in the case of Lahore. In our opinion, Lahore should be included and, if necessary, special safeguards may be introduced by having adequate representation of the High Court on the Bar Council to have that amount of control and guidance which was considered desirable by the Bar Committee in paragraph 50 of their report.

Autonomy and Independence refused.

Clause II, the definition clause, defines "advocate" as meaning an advocate entered on the roll of Advocates of a High Court under the provisions of this Act. The roll is the roll of the High Court concerned and not of the Bar Council. This is an absolute and flagrant negation of autonomy. The Bar Council is thus only a body of glorified clerks who are elected or nominated to enter names or to strike out names at the bidding of the High Court. This is a principle which has to be thoroughly understood. One may plausibly exclaim: "Ah! What is there in a name?" We do not regard it so. Just imagine the Inns of Court being required to maintain a roll, the particulars of which have to be dictated to by the Judges of the King's Courts in England. No English barrister would swallow this indignity. We want a Bar Council which will have really the powers which the Inns of Court in England possess. We shall not be happy, nor shall we rest content, if we are given less. The great ideals and the illustrious example of the Inns of Court have come to stay in this country. Why should the Indian Bar not have the same privileges and duties as the Bar in England possess? We have no objection to any high moral or intellectual standard being prescribed, before this autonomy is granted to the Bar. But autonomy we must have and the cost is of no consideration.

The important modification that has to be effected is to lay down that a Bar Council shall be constituted for the different provincial areas and that persons whose names are on the rolls of Advocates of a Bar Council shall be entitled to practise in the High Court and in any of the subordinate Courts that may be functioning within the area for which the Bar Council is constituted. This amendment is not a mere verbal amendment. Its consequences on the Bar as well as the High Court will be most wholesome; for, both will be reminded that the Provincial Bar Council is not a department of the High Court but is an autonomous independent corporation with statutory powers and duties. There ought to be no compromise on this question and the consequential amendments throughout the Act must be carried out.

Constitution and Composition of Bar Councils.

Clause III of the bill deals with the constitution of Bar Councils. The clause says,

"For every High Court a Bar Council shall be constituted in the manner hereinafter provided". As observed already, this ought to be amended so as to make a Bar Council being constituted for a particular area and not for the High Court in that area. Every Bar Council is made a body corporate having a perpetual succession under a common seal with power to acquire and hold property, both moveable and immoveable. All this is certainly pompous but the sting lies in this corporation being made a department of another corporation, namely, the High Court, from the leading strings of which the former is sought to be emancipated by this legislation.

Clause IV deals with the composition of the Bar Councils. Each Bar Council shall consist of 15 members of whom one shall be the Advocate-General, four shall be persons nominated by the High Court and ten shall be elected by the Advocates of the High Court from amongst their number. There is a provision that, of the elected members of every Bar Council, not less than five shall be persons of not less than ten years' standing. This is apparently to prevent the over-representation of junior members of the Bar, on account of their mere voting strength. We are not so pessimistic as to imagine that the junior members of our Bar are so irresponsible as to justify this provision especially as the number of the elected members for the whole province is so small. On the other hand, we should have expected a provision reserving at least one or two places on the Committee for persons of not more than ten years' standing. We may point out here by way of analogy the provision in the constitution of the Incorporated Council of Law Reporting in England for representation, however meagre, of the junior members of the Bar. Sub-clause iii of clause IV contains a by-product of the conflict between the single agency system and the double agency system. It provides that, in the case of Calcutta and Bombay, of the elected members of the Bar Councils, such number as the High Court may direct in each case shall be persons who have been, for such minimum period as the High Court may determine, entitled to practise in the High Court in the exercise of its original jurisdiction. This is a most objectionable provision because it is a permanent and not a transitory provision.

Charter for Double Agency System.

This perpetuation of the double agency system recognised by this clause is directly opposed to the recommendation of the Committee on the question of the unification of the Bar. The Indian Bar Committee, in paragraph 19 of their report, expressly stated:

"We recommend that in all High Courts a single grade of practitioners entitled to plead shall be enrolled, to be called Advocates (not barristers), that there shall cease to be a separate grade of High Court Vakils or Pleaders, and that, when special conditions are maintained for admission to plead on the original side of the High Court, the only distinction shall be within that grade which shall consist of advocates entitled to appear on the original side and advocates not so entitled."

In paragraphs 31 to 33 of the Report, the Indian Bar Committee make definite proposals for the gradual abolition of even this limited distinction on the original side of the High Courts of Bombay and Calcutta. We shall revert to this subject again a little later.

Unification of the Bar given up.

Clause V contains special provisions regarding the constitution of first Bar Councils. It has to be noticed that the first Bar Councils will be elected by and from amongst the Advocates, Vakils and Pleaders, who are on the date of the election entitled as of right to practise in the High Court. The electorate will therefore be not only persons who are actually practising in the High Court but also those persons who are entitled to practise in the High Court and who are actually practising in the subordinate Courts in the moffussal. The very large body of legal practitioners who are classified as First Grade Pleaders, though educationally they have the same degrees and attainments as High Court Vakils, and an equally large body of Second Grade Pleaders are all left out of account altogether. The great anomaly of the situation is that, while, in a particular moffussal centre, the Advocate entitled to practise in the High Court and the First Grade Pleader and the Second Grade Pleader have all equal privileges and duties as far as the local Court is concerned, the disciplinary control over them is vested in different bodies which could be justified only on the assumption that at least in theory different standards ought to be applied. If there is to be only one

standard of professional conduct, delinquents, whatever their status may be, have to be dealt with only on one Code of principles. We see absolutely no reason why the statutory Bar Council should not have disciplinary jurisdiction over legal practitioners other than advocates practising within the province for which the Bar Council is constituted. As we shall presently make clear, the present legislation is a very petty piece of legislation dealing with matters for which no legislation at all is required. The question of a homogeneous Indian Bar even on a provincial basis is shirked. At least, in some provinces, there is a strong body of public opinion among the members of the Bar that there should be only a single grade of legal practitioners.

It cannot now be said that legal practitioners with superior qualifications are not available in sufficient numbers. We see no reason why the system of enrolling inferior grades of practitioners should be perpetuated. The Indian Bar Committee and the Government of India have fought shy of this large and important question. The demand of the Bar is not to have some tinkering in the matter of procedure so far as High Court Vakils are concerned. The aspirations of the Bar have been grossly misunderstood. They want a single unified Provincial Bar with an elected Bar Council discharging functions corresponding to the functions discharged by the Benchers of the Inns of Court The Bar desire to have autonomy. They desire to regulate and be in exclusive charge of legal education, questions of professional etiquette, questions of the professional conduct of legal practitioners, and other questions affecting the internal discipline and administration of the Bar without any external control or interference. If the Government do not have sufficient confidence in the Bar, to meet their wishes they may say so and confer upon the Bar such real powers as in their opinion they deserve to possess.

So called powers of Bar Council unreal and humiliating.

This leads us on to the powers conferred by clauses VI and VII of the Bill on the High Court and the Bar Councils respectively. The High Court is to make rules to provide for the following matters :

(*a*) the manner in which elections of members of the Bar Council shall be held ; the method of determining, in accordance with the provisions of sub-sections (2) and (3) of section 4, the candidates who shall be declared to have been elected ; the manner in which the result of elections shall be published ; and the manner in which and the authority by which doubts and disputes as to the validity of an election shall be finally decided ;

(*b*) the terms of office of nominated and elected members of the Council ;

(*c*) The filling of casual vacancies in the Council ;

(*d*) the convening of meetings of the Council, and the quorum necessary for the transactions of business thereat ;

(*e*) the manner in which the Chairman and the Vice-Chairman of the Council shall be elected and their respective terms of office ;

(*f*) any matter incidental or ancillary to any of the foregoing matters.

We wonder what other detail is left to be considered by the Bar Council besides the rules to be framed by the High Court. We can well understand the anxiety of the Indian Bar Committee to provide that the rules for the election of the first Bar Council shall be framed by the High Court and that, after once the Bar Council is constituted and begins to function, in respect of subsequent elections and all other internal affairs, the Bar Council itself shall frame the necessary rules and bye-laws subject to the approval of the High Court. The Government of India naively suggest that they are improving the position of the Bar by enacting that the rules shall be made not only for the first elections but also for the subsequent elections as well, by the High Court and that the Bar Council is given the liberty of framing by-laws not inconsistent with the rules without submitting the same for the approval of the High Court as recommended by the Bar Committee. To say the least, this farce of giving responsibility and power is simply ludicrous. The Bar Council will be nothing more than an incorporated officer working for no remuneration subject to the orders of the High Court expressed in the form of rules in the making of which the Bar Council has no voice. What difference is there in principle between the position of the Registrar of the High Court who is bound to carry out the orders of the High Court and the Bar Council which is bound to carry out the directions of the High Court as contained in the rules ? This is most objectionable. The High Court should have nothing to do with the framing of the rules. If a Bar Council is apprehended to be so

irresponsible as to frame rules of an objectionable character, we have no objection to a residuary power being given to the High Court to veto these rules on the analogy of the visitorial jurisdiction exercised by the King's Courts over the Inns of Court in England. The English system has found to work so well and the English Bar have not been found wanting in discharging the heavy responsibilities that are theirs. The Incorporated Law Society in England is serving in the case of Attorneys the same purposes which the Inns of Court are serving in the case of Barristers. The centenary of the Incorporated Law Society was only celebrated the other day and there was praise all round for the manner in which the Society has been functioning. You must give to the Indian Bar real responsibility and not a travesty of it. The magnificent power given to the Bar Council of framing by-laws independent of the High Court which the Government of India adverts to, is restricted to the following matters:

(*a*) appointment of ministerial officers and servants;

(*b*) the appointment and constitution of committees of the Council; and

(*c*) any of the matters specified in clause VI in respect of which the High Court has not made any rules.

What a farce! Does any incorporated body want a by-law to appoint its own ministerial servants? Is any statutory power required for an incorporated body to do its work by appointing sub-committees? We see no object in glorifying these inevitable incidents of daily administration into statutory powers conferred upon the Bar Council.

Bar Council only Record-keeper.

The provisions relating to the admission and enrolment of advocates are left delightfully vague, so as to permit, when the time comes, the inevitable interpretation that the power to enroll advocates is vested in the High Court and the power vested in the Bar Council under the statute is only to keep the roll of the High Courts in its custody. Clause VIII says that no person shall be entitled to practise in the High Court, unless his name is entered in the roll of the High Court and maintained under this Act. Of course, an exception is made in favour of the Attorney who is not brought under the provisions of this Act. Every Bar Council is required to prepare and maintain a roll of advocates of the High Court for which the Council has been appointed. Clause IX says that the Bar Council may, with the previous sanction of the High Court, make rules to regulate the admission of persons to be advocates of the High Court. Be it noted that these rules have to be made only with the previous sanction of the High Court. The rules have to provide for the following matters, namely,

(*a*) the qualifications to be possessed by persons applying for admission as Advocates;

(*b*) the form and manner in which applications shall be made to the High Court for admission;

(*c*) the giving of notice by the High Court to the Bar Council of all such applications;

(*d*) the hearing by the High Court of any objection preferred on behalf of the Bar Council to the admission of any applicant;

(*e*) the issue by the Bar Council of certificates of enrolment to persons who have been admitted to be advocates;

(*f*) the form and manner in which the roll of advocates shall be maintained; and

(*g*) the charging of fees payable to the Bar Council in respect of admission and enrolment and of the issue of certificates.

Clause (*b*) makes it quite clear that the application for enrolment as an Advocate has to be made to the High Court and clause (*c*) gives the Bar Council the pleasant opportunity of objecting to the enrolment of a person as an Advocate about whom the Bar Council is ordinarily not likely to know anything at the time of his making the application. The Bar Council is created as the public objector to enrolment of Advocates. This pleasant task is magnified into a privilege. After the High Court has enrolled a practitioner, instead of the certificate of enrolment being issued over the signature of the paid Registrar of the High Court, the certificate has to be issued under clause (*e*) by the unpaid Registrar, namely, the Bar Council. The Bar Council is not to have the independence of even prescribing the form and manner in which the roll of advocates shall be maintained without the intervention, at the rule making stage, of the High Court. We are afraid they have forgotten a most vital thing: the place where this roll has to be kept should also be prescribed by the High Court!

Advocates to be unpaid Employees of the High Court.

Sub-clause iv of clause IX introduces a novel provision. The High Court for the first time is given the power to admit such and *so many* persons to be Advocates as it

thinks fit. We are aware that, in some Residency Courts and in some Courts of Native States, the number of persons entitled to practise in a Court is restricted and as and when vacancies occur persons are appointed. A similar system was in vogue in the days of the East India Company under which, in the Zillah Courts, the Zilla Judge appointed a number of Pleaders to practise in his Court. They were only unpaid servants of the Court liable to be reprimanded, fined and suspended for want of respect to the Court, for making mistakes in the drafting of pleadings and for other cognate causes. Thanks to the generations of courageous and independent lawyers that we have had, these objectionable and insulting provisions relating to the members of an honourable profession have become things of the past. But now, as a result of the agitation for more powers and for real autonomy, the Bar is going to be made the unpaid establishment of the High Court whose number can be regulated at the sweet will and pleasure of the High Court and the control over whom is to be had by the High Court, and by the Bar Council, a part of its unpaid establishment, and by the subordinate Courts, a part of its paid establishment. These are good fruits indeed for the strenuous agitation for an autonomous Indian Bar.

As in the case of enrolment which is only a polite way of describing an appointment as an advocate, the High Court has been given under clause X the power of reprimanding, fining, suspending or removing from practice any Advocate of the High Court whom it finds guilty of any professional misconduct.

High Court Supreme even in Domestic matters.

The question whether a member of the Bar is guilty of any professional misconduct is exclusively a matter of domestic concern to the Bar Council. We can see no justification for making a High Court the influential and final arbiter in a matter like this. Will such a claim by the King's Judges in England be tolerated for a minute by the Inns of Court or will even English Barristers who are practising in our country submit themselves to such an indignity? If the legislature feels that the Bar Council is not fit to be in exclusive charge of such an important matter, by all means let there be honesty about it and let them say so, and let all these provisions be scraped. If there is a hope that these Bar Councils can be improved so as to shoulder this responsibility, it is only just and proper that adequate safeguards should be provided for a proper discharge of these functions by the Bar Council. But the Bar Council should be given this privilege. The High Court may have the right of vetoing or a right of final judgment. But it is derogatory to the self-respect of the Bar that it should be asked to accept such a retrograde provision as is found in Clause IX. There is no use in mincing matters. If the legal profession in this country is not to be independent and if it is to be treated as the unpaid establishment of the King's Judges, let it be frankly stated. Any compromise over these fundamental questions is not beneficial to the Bar and to the larger interests of the country, whatever temporary satisfaction may be obtained by those who take a delight in treating the Bar as this Bill has done.

Inquiry Tribunal only a Decree clerk.

Clause X, Sub-clause 2, no doubt recognises the privilege of the Bar to receive the command of the High Court, to inquire into a case referred to it by the High Court. It is open to the High Court to refer a particular case either to a Bar Council or to a Court subordinate to the High Court. If a particular Bar Council has not earned the confidence of the High Court, the statute takes care to give the High Court an opportunity of neglecting the Bar Council altogether and giving to the Court subordinate to the High Court this great privilege of receiving the High Court's command for inquiry.

Even this halting privilege of making an enquiry is not to be given with any generosity. The enquiry has to be conducted not by the whole Bar Council but by a Committee of the Bar Council to be called the Tribunal. The Tribunal shall consist of not less than three or more than five members of the Bar Council appointed for the purpose of the enquiry by the Chief Justice or Chief Judge of the High Court and one of the members so appointed shall be appointed to be the President of the Tribunal. How is the Bar Council any better than the Registrar of the High Court, we ask again? This is only a device to save the time of the judges in enquiring

into questions of professional misconduct by enabling them to delegate the work to a named body of statutory persons who are expected to work without remuneration. Beyond this we fail to see what improvement in the position or dignity of the Bar this provision is calculated to effect.

Even this made-to-order Tribunal is not to be trusted. Under Clause XII, the High Court has to make rules to prescribe the procedure to be followed by the Tribunal. The Tribunal being appointed by the High Court and having followed the procedure prescribed by the rules framed by the High Court is not to have in its hands the final decision. It is given the magnificent privilege of reporting to the High Court its conclusion. It is open to the High Court to accept the finding or to reject it. It is also open to the High Court to ask this erring Tribunal to revise their notions and to reconsider the matter if the High Court is not satisfied with its report. The most curious part is sub-clause 3 which requires the Bar Council to send a representative to represent it at the final hearing of the case before the High Court and to support the report submitted by it to the High Court after the statutory enquiry. Sub-clause 5 is very careful to prescribe that, when any advocate is reprimanded, fined, or suspended under this Act (that means by the High Court), a record of the punishment together with a brief statement of the reasons therefor shall be entered against the name in the roll of Advocates of the High Court and, when an Advocate is removed from practice, his name shall forthwith be struck off the roll. Are we not justified in asking whether in this matter the position of the Bar Council is anything better than the decree clerk of the High Court bound to draft the decree and to keep the record accurately in accordance with the decision of the High Court?

More pompous trifles.

The vanity of the members of the Tribunal must be sufficiently tickled by Clause XIII which gives certain powers to the Tribunal in enquiries. They are purely informal and relate to procedural matters which have to be provided for. The level headed and senior members of the Bar who are likely to constitute the Tribunal are not likely to attach any weight to these tinsel-wrappings which are likely to hide the nothingness of the provisions of this Bill. The farce is carried further in Clause XIV which enables the Bar Council to make rules for enabling advocates of other Courts to practise in the High Court over which the Bar Council is constituted. The Bill again indulges in pompous nothing in Clause XV. A Bar Council may, with the previous sanction of the High Court for which it is constituted, make rules consistent with this Act to provide for and regulate any of the following matters, namely:—

(*a*) the powers and duties of the advocates of the High Court and their discipline and professional conduct;

(*b*) the conditions subject to which advocates of other High Courts may be permitted to practise in the High Court;

(*c*) the giving of facilities for legal education and the holding and conduct of examinations by the Bar Council; and

(*d*) the charging of fees payable to the Bar Council in respect of the employment of educational facilities provided by, or of the right to appear at examinations held by, the Bar Council.

We cannot for one moment imagine that any Bar Council will be so stupid as to frame a self-containted code of rules on professional etiquette. The powers and duties of the Advocates of the High Court are referred to. We are used to associate the words, 'powers and duties,' in connection with paid or unpaid public servants. We should have expected the recognition of the conception of the rights and duties of the Bar as an integral part of the administration of justice rather than the tail talk about the powers and duties of the advocates of the High Courts to be appointed by the High Court, if there are vacancies or when they desire, and to be fined or dismissed by the High Court under certain conditions over which the Bar has not the exclusive and final determining voice.

The glib reference to giving facilities for legal education, we believe, means nothing. Does the High Court contemplate the abolition of the University Law degrees as a passport to enrolment and will any High Court entrust the administration of the Law College within its jurisdiction into the hands of the Bar Council? We are sure that nothing is farther from the mind of the draftsman than any such contingency. A poor aspirant to the law degree will be saddled with further costs in the shape of fees to be paid for the upkeep of this costly bauble which is thrown out to please the sentiments of Indian lawyers. We are surprised that any one could have thought

for a while that such a thing would meet the needs of the situation.

The Legal Practitioners Act of 1879 remains intact and unamended. So too are left intact the powers of the High Courts under their Letters Patent. The reference in Clause XVIII that, on this Act coming into force, the Letters Patent shall, in so far as they relate to matters for which provision has been made by or under this Act, be deemed to have been repealed. This is only an eye-wash. If this Act confers on the High Court much more power than it had even under the Letters Patent, what grievance can there be from the High Court's point of view? From the point of view of the Bar the change is from the frying pan into the fire.

Conclusion.

We have said enough to justify our opinion that the present bill is absolutely disappointing and unsatisfactory. The aspirations of the Indian Bar for which we have been agitating all these years can be classified under the following main heads:

1. The Indian Bar shall be autonomous; thatis, it shallhave exclusive control over its internal affairs without any interference or control by the High Court or any other extraneous body. We have no objection to have the High Court as fully represented, as may be necessary and in any manner that may be prescribed, on the Bar Council. But the Bar Council must be supreme. It cannot be treated as a Trade Union of the unpaid servants of the King's Judges, the rules of the Trade Union being laid down by the Judges themselves.

2. Until the Bar is ripe for having a Central All India Bar, the Bar should be organised on a Provincial basis, the Bar Council being constituted for separate territorial areas and not as departments of the respective High Courts.

3. The Provincial Bar must be a single unified Bar having only one grade of practitioners, the different grades of Advocates, Barristers, Attorneys, Vakils, First Grade Pleaders, and Second Grade Pleaders being all merged into one grade, designated as advocates, being entitled both to plead and to act in all the Courts and in all classes of work. Further recruitment of the inferior grades should be prohibited altogether.

4. The Bar Council shall be an autonomous body entitled to prescribe its own standards of etiquette and entitled to make rules for dealing with persons guilty of professional misconduct or other shortcomings in the exercise of their profession. We have no objection to the High Court exercising visitorial powers as the King's Judges do over the Inns of Court in England.

5. The Bar Council shall be in exclusive and independent charge of legal education qualifying persons for enrolment as advocates. The University law degrees may continue as heretofore without being affected by the professional legal education which will be in the hands of the Bar Council.

On none of these points is the present Bill giving any satisfaction. The provisions herein contained are a negation of these ideals and aspirations. It is better to have subordination under the unwritten law of a vague and indefinite character rather than subordination under the written law containing provisions calculated to lower the dignity of the Bar and therefore the dignity of the Bench also.

Those who talk lightly of the legal profession should not imagine that the disorganised Bar can be treated in any way they like and that they will have the support of the country in the belittling and the humiliation of the Bar. We are sure the members of the Indian Legislature have realised the great need that now exists more than ever for creating and keeping in this country a self-reliant and independent Bar which will discharge its duties fearless of the frowns of Judges. While the Indian constitution is in the process of being moulded, while the great issues for the transference of the Government from the present form into the form known as responsible Government are being fought out, the Indian Bar will be the strongest bulwark for the rights and liberties of the citizens of the State. We are sure, if the Bar takes the trouble to educate public opinion, there will be no difficulty in getting the legislature to recognise the just claims of the Bar. When once the rights and aspirations of the Bar and the great services rendered by them for the promotion of the common weal are well understood, we are sure the legislature will lose no time in re casting and re-shaping the provisions of this bill so as to meet substantially the wishes and aspirations of the Bar in the directions outlined above.

G. N. Das
Advocate High Court
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Notes and Comments.

THE RIGHT TO REMAIN IN PRISON.

A situation almost Gilbertian has arisen in the States with regard to the granting of a pardon to a convicted felon and its polite but firm refusal by the felon concerned, if report is to be believed. We confess that we can hardly believe it, much as we should like to, if only for the fascinating novelty of the points which it raises or suggests. The position is this: A murders X, but, before he is apprehended, also commits a less offence with regard to Y. As to the latter offence he is immediately caught, tried, convicted and imprisoned. Next he is tried and convicted of the murder of X, but when it is proposed to inflict the death penalty, "Not yet," says A; "I have my term of imprisonment to serve and I insist upon serving it." Here is a case of opinion of counsel such as no A has ever yet, we suppose, propounded! Meanwhile the State authority proposes to resolve the dilemma by pardoning A of his offence in respect of Y, so that he may be available forthwith to be dealt with in respect of his murder of X. If pardons are privileges which the intended object of them may refuse at will, here undoubtedly is a pardon which would never be accepted. We regret that more serious matters of the law prevent our dealing at length with this intriguing question. We venture to recommend it to the promoters of a Moot.

THE LAW JOURNAL,
December 5, 1925, p. 976.

ATTACKS ON CHARACTER OF ACCUSED.

Two cases in the Court of Criminal Appeal on the 7th instant involved interesting points: *Rex* v. *McCraig* and *Rex* v. *Hewitt* (Weekly Notes: 1925, M.W.N. 292). *McCraig's Case* emphasised the protection from any inquiry, in the hearing of the jury, as to previous character and antecedents, which is afforded an accused person so long as he refrains from putting those matters in issue himself. The defence was an *alibi*, and a witness as to it had, it appears, given similar evidence for the same accused in another criminal proceeding. We may readily understand the desire of the prosecution to discuss this fact in cross-examination, and it may well be conceded that the sole intention of the questions asked was to test the witness's credibility. But the Court of Criminal Appeal was manifestly right in quashing the conviction, which resulted from the trial after the questions had been put to the witness and the witness compelled to answer them. Whatever the motive of the cross-examination, it involved an intimation to the jury that the accused had been tried on a previous occasion in a Criminal Court. The accused, not having put his character in issue, was entitled to be spared any reference to that previous occasion. *Rex* v. *Hewitt*, on the other hand, demonstrates that there are limits to the kindness which the law affords to accused persons; it reaffirms, in a harder instance, the rule in *Rex* v. *Shellaker* (1914, 1 K.B. 414).

THE LAW JOURNAL,
December 19, 1925, p. 1018.

SOLICITORS AND BARRISTERS.

DISCUSSION IN THE HOUSE OF LORDS.

ON THE RATING AND VALUATION BILL.

THE EARL OF BIRKENHEAD.

By an ancient arrangement almost singular to this country there is a division of function between the two branches of solicitor and barrister. Year after year proposals are made amongst solicitors that the two branches of the profession should be amalgamated so that solicitors and barristers would hereafter be indistinguishable. Year after year that proposal has been defeated, not by counsel, but by solicitors themselves, and it is obvious that they have defeated that proposal because of a clear realisation that such a change would be a disadvantage to the interests of solicitors, and so, of course, it would be. Consider the effect of releasing in competition with all the young men who

become solicitors in one year that tremendous supply of ability which in that same year is called to the Bar, and equipping them with the right to go directly to the lay clients. The reason that solicitors will not agree to this is not that they do not realise the disadvantages of the present system; they are apparent. In the first place, solicitors are denied the right of audience in the Superior Court. In the second place, they are denied the opportunity of attaining to high judicial rank, and yet, being fully aware of this disability, year after year, by growing majorities, the solicitors' branch refuses to be amalgamated with the Bar.

Your Lordships really must examine, as Lord Carson said, this proposition as a whole. If solicitors came before Parliament and the country and said: "We demand that we shall no longer be in a position in which we are precluded from the right of audience at the Bar and the right to attain to high judicial position, "I do not know that it would be very easy to resist their demand. They do not do that. Here they come and say: "We claim the right to retain all our special privileges and we also claim the right of inroad upon yours." I am not sure that my noble friend the Leader of the House has been very exactly advised, though I do not speak dogmatically when the noble Marquess says that Quarter Sessions in some cases still have it in their power to allow audience to solicitors. Unless my recollection is altogether wrong, they can only exercise that right where there is not a sufficient Bar. I am reminded that in Wales there are several Quarter Sessions where there was not a sufficient Bar and where consequently the magistrates have exercised this reasonable right. A justly indignant Bar, not tempted by the lure of adequate rewards, but concerned in the vindication of a noble principle, descended upon those Quarter Sessions and obtained immediately, without protest and without resistance, the complete repeal of this peccant rule. As for the licensing committee, it is not Quarter Sessions. It is in the same class as the business of the ordinary justice of the peace, and nobody has attempted to deny the right of audience to solicitors there.

THE LAW JOURNAL,

December 26, 1925, p. 1050.

Reviews of Books.

The Lawyer's Companion Diary, 1926.—Published by the Lawyer's Companion Office, Mount Road, Madras.

This well-known Diary printed at the Law Printing House, Mount Road, Madras and published by the Lawyer's Companion Office shows this year several new features and improvements which will make the Diary of the greatest use to the members of the Bar and the general public. Very full information is given about the various High Courts and Local Governments in this country. The Indian Calendar is given as part of the Diary. The names of the Hindu cycle of years with corresponding years of the Christian era will be found of much practical use. The most important departure is the All India Calendar incorporated in the Diary for the year 1926 showing for each day the English month and date in the year 1926 with the corresponding year, month and date according to the Tamil, Telugu, Canarese, Mohammadan, Bengalee, Punjabi, Guzarati, Fasli and Burmese calendars. This portion of the Diary really makes it an All India Diary useful to lawyers all over the country. Very full information, not ordinarily found in Diaries is given, in addition to the usual extracts from the Court Fees Act, the Stamp Act, the Registration Act, etc. The usual high standard of excellence in paper, printing and get up is maintained in this issue. The extra pages for the first three months of the year 1927 and the pages for noting engagements in the year and for Cash monthly abstracts, etc., are unique features of this Diary which the public are immensely appreciating.

The Criminal Court Manual—Imperial Acts.—Published by the Madras Law Journal Office, Mylapore, Madras, 1925. Price Rs. 15. Pages 1650, Royal 8 vo.

The Madras Law Journal Office has again laid the legal profession under great obligation to them by issuing this cheap

and excellent volume. Herein are brought together all the Imperial Acts relating to the Criminal Law, substantive and adjective. The first seven hundred pages are devoted to the Major Acts, namely, the Criminal Procedure Code, the Indian Penal Code and the Indian Evidence Act and the rest of the book is devoted to the minor Acts passed by the imperial legislature. The Criminal Procedure Code is printed so as to show to the reader not only the present law but the old law as well printed in parallel columns as in the well-known edition of the parallel Code of Criminal Procedure issued by these publishers some time back. As foot-notes under each Section the compilers have given a very brief notice of important cases bearing on the Section. Practically no important case which is worth knowing is omitted in these full and brief foot-notes. Wherever necessary extracts are given from Select Committee Reports and the Proceedings of the Legislature to give the history of a particular provision or to throw light on any obscure points in a Section. To each of the minor Acts is prefixed prefatory notes giving the legislative history of each Act including relevant extracts from the speeches delivered in the legislature. Another very unique feature of this publication is the incorporation at the proper places *in extenso* of the several rules and regulations made by competent authorities under statutory powers conferred on them by the statutes published in this volume. For example, the Indian Factories Act is given and at the end of the Act we find in *extenso* the rules and regulations made under the Factories Act. In the case of certain enactments where Provincial Governments are authorised to make the rules as in the case of the Female Infanticide Prevention Act, the rules framed by the several provincial governments are published. The index is very full and even a person who is not aware of the existence of an Act on a particular subject will be able to reach the provisions required by him by reference to the index. The usual standard in printing and get up is maintained. We are sure that many practitioners who are exclusively practising in Criminal Courts may get on very well with this single book on their table. For the attractive binding and the quality of the printing and paper used, the book is priced extremely cheap.

The Principles of Circumstantial Evidence.—By William Wills. The Indian edition edited by M. Krishnamachariar, M.A., M.L., PH.D. Published by Butterworth & Co. (India), Ltd., Calcutta, 1925, Pages 703, Demy 8 vo.

It is a happy idea of Dr. M. Krishnamachariar of the Madras judicial service who is well-known to the legal profession by his erudite editions of the "Law of Trusts", "Law of Ultra Vires", "Commentaries on the Madras Estates Land Act", etc., to publish the Indian edition of the celebrated treatise, "Wills on Circumstantial Evidence". Generations of lawyers both in England and in India have been familiar with this book since the first edition appeared in the year 1838. It is a text-book on the Law of Evidence prescribed by most of the Indian Universities and we believe it is read by all law students in England. The very scientific treatment of this subject makes the book specially attractive, while the earlier chapters on the nature of evidence in general and circumstantial evidence and exculpatory presumptions and inculpatory indications will be found very valuable by both students of law and legal practitioners. The chapter on the proof of *corpus delicti* will be found exceptionally useful by legal practitioners. So too will the Bar find of the greatest value the two appendices, the one giving a note for tests of human blood and the other giving suggestions for the examination of medical witnesses. The treatment of the subject by the celebrated writer is kept intact and the Indian editor has added a discussion of the Indian Case-law. From the point of view of the Indian law student and the Indian practitioner, an Indian edition discussing the English case law and the Indian case law is quite necessary and will be widely welcomed. The book is excellently printed and got up by the Commercial Press, Madras.

The Law of Easements and Licenses in British India.—By Brindaban Katiar, B.A., B.Sc., LL.B., Vakil, High Court, Allahabad, Published by Butterworth & Co. (India), Ltd., Calcutta, Pages 672, Demy 8 vo.

We agree with the author that the Indian Easements Act of 1882, though one of the oldest acts of the Indian Legislature, is the

least studied and the least understood. The reason is not far to seek. Even in England, the Law of Easements and Licences mostly developed by the judge made law is considered to be a very difficult and obscure branch of the law. The Indian Act has enunciated in the form of propositions the conclusions arrived at by eminent English Judges in cases found scattered in the volumes of the English Law Reports, both ancient and modern. Till recently, besides the standard English publications on the subject by Peacock, Gale and Goddard, the Indian Student and Lawyer had no Indian edition available to elucidate the Indian Easements Act. Further, the English editions may be found to be a little too costly by a large section of the Indian Bar. The want of a good commentary on the Indian Easements Act is, in our opinion, the main cause for the provisions of the Act not being as well-known and understood as the provisions of other Indian Enactments. No doubt in recent years some attempts have been made to meet this want. The volume before us is one of the most successful attempts to meet this long felt want. The author's introduction to the subjects gives a clear analysis of the Act and will be found very useful by students of law who have to study this Act in detail in most of the Indian Universities. The commentaries under each Section are very lucidly written and very well arranged. English decisions are freely cited and the differences if any between the English Law and the Indian Law are clearly pointed out. The references to the Indian Case Law are exhaustive and thoroughly up-to-date, the latest cases published in the All India Reporter up to September, 1925, being all incorporated. A very attractive feature of this book is Appendix 'A'. It is a neatly written treatise of six chapters on the special characteristics of important easements. Easements relating to air and light and support are fully dealt with. Chapters 4, 5 & 6 of the appendix dealing with water-rights, rights of way, and miscellaneous easements relating to burial, markets, ferries, privacy, religious observances, fisheries, etc., will be of the greatest value to Indian Students of Law and Legal Practitioners. We congratulate the author on these commentaries and we are sure that this book will make more widely known understood this abstruse and difficult branch of Indian Law. The book is dedicated to the Honourable Sir Edward Grimwood Mears, Kt., K. C., Chief Justice of the Allahabad High Court.

Police Officer's Companion. By Baquir Husain Sahib, Inspector of Police, Tanjore District. Volumes I & II, 1925. Price, Volume I, Rs. 3-4; Volume II, Rs. 3-4.

Volume I gives an analysis of Police orders, the Criminal Procedure Code and the Indian Evidence Act; and Volume II gives an analysis of the Indian Penal Code and some selected special and local laws. The book is written from the point of view of a police officer admittedly for the benefit of police officers. The sections are analysed in the author's own way and brief and disjointed references are given to selected cases. We hope the book will be found useful by those for whom it is intended.

THE
ALL INDIA REPORTER
1926] (JOURNAL SECTION) [MARCH

Articles

Representation in Suits against the Estate of a Deceased Debtor.

There is no end of trouble which a creditor has to face in actions to recover moneys due to him from a deceased debtor. Sometimes, a debtor dies during the pendency of an action and the creditor brings on the record some legal representative. In other cases, the debtor's representatives are originally impleaded as parties to the action and a decree is obtained thereon. The difficulties are more or less the same in both sets of cases. The creditor is often times thrown into a perplexing situation after the proceedings have gone very far.

A marked line of distinction exists between the rulings under the old Code and those under the new Code. Under the old Code a creditor ran great risks in not choosing the true and proper legal representative. The principle of bona fide representation was not readily accepted. Any decree the creditor got against the wrong legal representative would not bind the estate. The wider definition of legal representative in the present Code which includes also the legal reprsentative de son tort has made possible the application of the doctrine of bona fide representation and the creditor's risks are very much less to day.

The cases dealing with the question may be broadly divided into two classes. Those in which the debtor had died before suit and some one or more were impleaded as heirs in possession of the estate of the deceased, and those in which the debtor died pending suit, and some one or other was impleaded as his legal representative either before or after decree as the case may be. The great majority of cases belong to the latter class. Sadasiva Iyer, J., holds in 29 M. L. J. 698 that this circumstance makes no difference at all. While in 26 M. 230 Bashyam Aiyangar, J., holds the opinion that it does, and that bona fide representation is good and sufficient only where legal representatives are brought on record, on the death of a party to the suit.

So far as the heirs of a Muhammadan debtor are concerned, the principle would appear not to apply, though it must be admitted that there is a striking diversity of judicial opinion on the point. In 26 M. 230 the mortgagor was a Muhammadan and had died pending suit. Though he had a widow and sons as his heirs only his eldest son was impleaded as his legal representative. A decree was passed for sale of the estate and it was purchased in execution and taken possession of. There was also a sale of the second son's interest in the property for default in the payment of income-tax under the Revenue Recovery Act and property taken possession of by the purchaser. In a suit for possession by the purchaser in execution of the mortgage decree, who evidently had lost possession, one of the questions raised was as to the validity of the decree for sale which had been passed without impleading all the heirs as legal representatives. Bashyam Aiyangar, J., holds that a creditor may never be able to enforce his remedy if he should be compelled to choose only the true and proper legal representative or to secure a full representation of the estate.

In a later case in the same volume at page 734, decided by Bashyam Aiyangar and Benson, JJ., the parties were Muhammadans. One of the co-heirs of a deceased Muhammadan had sold portions of his estate for debts admittedly due from the estate of the deceased. It was also in evidence that the co-heir was in posses-

sion of the full estate. The general principle of Muhmmadan law is stated by his Lordship to be that debts have to be first met out of the estate and that a creditor may enforce his remedy against any co-heir who may be in full possession of the estate. Then, his Lordship passes on to the other conclusion viz., if the creditor can by an action against any one co-heir in possession of the full estate recover judgment against the estate, it makes no difference that one such co-heir voluntarily alienates it in discharge of an admitted debt of the deceased.

This decision was overruled by the Full Bench in 40 M. 243 and it was held that no co-heir had any right to deal with or dispose of the share of the other co-heirs (who are tenants-in-common) even for a debt due by the deceased Muhammadan debtor. With regard to the statement of the general principle of Muhammadan Law in 26 M. 734, the Full Bench said that it was part of the processual law laid down in the Hedaya and would not affect the substantive rights of the parties. On the merits of that principle, as judicially recognized the Full Bench took note of the conflict of rulings, the Calcutta and the Bombay High Courts holding the view that any one co-heir is sufficient to represent the estate of the deceased in an action to recover a claim from the estate, and the Allahabad High Court holding the opposite view. In a Calcutta case, the sufficiency of the representation was made out by looking upon the action as an administration action. In other cases the analogy of the Hindu Law doctrine of representation would appear to have been present to their Lordships' minds, and the representation was held sufficient : (vide 20 Bom. 338). The Full Bench leaves open the question, contenting itself with the observation that at any rate it was part of the processual law of Muhammadan Jurisprudence as laid down in the Hedaya.

The weight of this last argument seems to have been taken away now in view of the decision in 43 Bom. 412. That related to a suit for partition put in by an alienee from the heir of one of the heirs to a deceased Muhammadan. In a former suit to recover a debt admittedly due by the deceased Muhammadan, this particular heir alone was not impleaded and there was a decree in execution of which the properties of the deceased were sold and purchased. The Court adhered to the Allahabad view and declined to follow its earlier view and that of the High Court of Calcutta. It explained away 26 M. 734 and 40 M. 243 (F. B.). It held that even as a matter of procedure the rule laid down in Hedaya will not apply having been overruled by the Civil P. C. The Court followed the principle laid down in 32 Cal. 296, that where a person is not properly represented in any proceeding, any decree passed in such suit cannot affect his interest in the property that may have been sold in execution, and the decree must be considered to be one passed without jurisdiction and void as against him.

In the Privy Council case both the sets of facts I set out at the commencement present themselves. The facts are rather complicated. But for our purpose, it is sufficient to state the following: In 1874 a mortgage was granted for Rs. 5,600 and odd by five persons (all Muhammadans) over different properties held on leasehold right from the Government, the patta for each property standing exclusively in the name of one of them, though every property was held by them, in certain shares as tenants-in-common. The mortgagees were two persons who were also Muhammadans and partners in a firm. In the same year, the same mortgagors granted a fresh mortgage for over Rs. 2,000 of the same properties to the same partners and another who was a co-partner with them. Subsequently in discharge of the two former mortgages, in 1878, one set of mortgagors executed a mortgage to the original two partners for their half share of the mortgage money. Another set executed a similar mortgage of even date to the same two mortgagors for their share of the mortgage money. These two latter mortgages fixed a five years' period for redemption. They would nevertheless appear to have been ignored altogether. The mortgagees desired to get at the equity of redemption by taking other proceedings. One of the mortgagors who owed money under a simple bond died leaving somo heirs. The partners brought a suit to recover this sum against the minor son of that mortgagor, represented by his paternal uncle as guardian. The suit was compromised. A decree was passed

and in execution, Patta No. 174, which stood in the name of his father, was sold and purchased by the son of one of the partners, benami for the firm. Then the third partner in whose favour too there was a mortgage of the year 1874 for Rs. 2,000 and odd instituted a suit to recover his share of the mortgage money by sale. He left out of account the party to the money suit above mentioned, but impleaded the other mortgagors or their representatives as the case might be.

There was a reference to arbitration pending suit, and one of the mortgagee-partners was appointed arbitrator. The reference was not by all the parties-defendants. He gave an award, which was passed into a decree directing the sale of the remaining mortgaged properties. They were also purchased benami for the firm.

In 1897 the mortgagors (whoever of them was living then) and the representatives of the mortgagors sued to redeem. Among other pleas, the representatives of the mortgagees raised the question of the sale of the properties in execution of the previous decrees and their validity. In regard to the mortgage suit it was seen that one of the mortgagors who was a party defendant died leaving a widow, four sons and one daughter as heirs. Excepting the daughter, the rest were impleaded as the legal representatives of the deceased defendant. Their Lordships held that there was sufficient representation of his estate and that the exclusion of the daughter was immaterial. But in the case of the minor who was impleaded in the money suit as the legal representative of one of the deceased mortgagors, and who was represented by his uncle as guardian without being appointed as such by the Court, the Board held that there was no representation either in law or in fact of the estate of the deceased. In the mortgage suit he would appear not to have been impleaded at all. Their Lordships draw attention to the discretion wisely exercised by the Courts in India in the matter of permitting the estate of a deceased debtor to be represented by any one of the heirs alone. But they say in the same breath that they are all cases of joint family, and in such cases generally, there is representation of the entire estate by the de facto manager, They distinguish 25 Bombay 377 (P. C.) on the footing that in that case, the Court decided that the legal representative proposed in execution proceedings, who objected to being impleaded, was nevertheless decided to be the legal representative, and that the creditor had no option but to go on with execution against him on the record. Their Lordships further take care to point out that the objection is one of substance rather than of form. There, unhappily, are no facts in the judgment to show that there were other heirs than this minor son entitled to the estate of the deceased co-mortgagor. Is it rather that the matter had been complicated in that case by violation of the provisions of O. 32? Whatever it is, the Madras High Court lays down in 33 M. 6 that the Privy Council could hardly have intended to use an exhaustive classification, in stating that representation for the purposes of litigation may be incomplete, yet sufficient, in cases where the heirs constitute a joint family.

The broad principle that no one who is not a party to a suit is bound by any decree passed therein, is subject to the exception, so far as Madras is concerned, created in favour of a creditor in suits by him to recover a debt due by a deceased debtor, wherein the representation of the estate of the deceased debtor is incomplete, but not insufficient, being bona fide. The exception applies whether the debtor had died before suit or pending suit (29 M. L. J. 698). But it would appear to be restricted by one condition as seen from the latest decision by Ramesam, J., reported in 22 L.W. Short Notes page 108 —The person impleaded should have been in possession of the estate of the deceased. Though this ground of decision is not expressly stated in 33 M. 75 that judgment could be explained on that basis clearly. If the widow was in possession of the estate there would have been nothing wrong in the decree, and if the properties were sold, it could not be said that the adopted son who subsequently established his right was not bound by the decree or the sale; what was objected to was his being impleaded in execution proceedings in order to get at the estate which had come into his possession under decree of Court.

In 33 M. 6 the representation by anyone who prima facie has the best title to

be the legal representative was considered sufficient. The analogy of the provisions of the Succession Certificate Act was also pressed into service in that case. The reasoning in 29 M. L. J. 698, 31 M. L. J. 222 and 36 M. L. J. 106 is very nearly the same.

In 8 Law Weekly, page 19, a suit was originally instituted for specific performance of a contract of sale entered into between the plaintiff and the 1st defendant's husband who died pending suit. His widow, daughter-in-law and mother were impleaded as his legal representatives in the suit. The daughter-in-law did not appear. The mother and the widow appeared and pleaded that there was a Will in favour of the daughter-in-law bequeathing the property to her. There was a decree for specific performance against the widow ; and dismissing the suit against the mother and the daughter-in-law. The daughter-in-law was in possession of the estate. The plaintiff subsequently sued for mesne profits. The daughter-in-law pleaded that the former decree was not against her and that therefore she was not liable. If the broad principle enunciated above applied and not the exception, how could the Court have decreed the suit ? The Court distinguished the Privy Council case in 32 Cal. 296 by saying that in that case there was no representation at all. Could this judgment be defended on the principle of representation known to Hindu Law, seeing that of the three impleaded in the former suit, none could represent the rest?

There is another case reported in 14 C. W. N. 1041 where the exception created by the doctrine of bona fide representation might have been applied if the facts were different. In a suit by a creditor to recover a debt from the estate of a deceased debtor impleading the heirs on intestacy, the executor under a Will made by the debtor intervened and applied to be made a party. This application was opposed by plaintiff and he got a decree and brought the estate of the deceased debtor in the hands of the intestate heirs to sale ; in a suit by the executor to set aside the decree and the sale, the doctrine of bona fide representation, though attempted to be applied was rightly rejected.

I venture to submit that the interpretation of the principle laid down in 33 M. 6 is correct. The exception pointed out is not inapplicable to Muhammadan heirs. If any one of the heirs who is in full possession of the estate of the deceased is impleaded, has there not been sufficient representation for purposes of litigation ? Supposing one, who had no right at all, but intermeddled with the estate of a deceased Muhammadan, was alone impleaded in the suit, and a decree was obtained against the estate could not the debt be recovered by levying execution against the estate ? Could not any of the heirs then more effectively represent the estate for the purpose of litigation ? The wide definition of legal representative in the Code is of no value unless such representation is recognized as effective for binding the estate. In allowing even an intermeddler to represent the estate, the Legislature has kept in view the principle that the estate of every debtor is liable for the payment of his debts, and to pass a decree effective and binding on the estate, it is not necessary to secure correct and complete representation of the estate by his heirs. No principle of Muhammadan Law would then appear to be violated, if there was a representation of the estate of any deceased Muhammadan debtor by one of his heirs and if he was in possession of the estate.

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THE
ALL INDIA REPORTER

Articles

Chit Funds and their legality.

A Chit-fund or a Kur-chit is an indigenous institution very common in the presidency of Madras. In slightly varied forms we have reason to think that Chit-funds are run in other provinces as well. The Chit-fund is an institution of great economic value for providing cheap and ready credit and for promoting thrift among poor people or among people engaged in small commercial ventures. Chit-funds are often organized and run for the benefit of the members of a particular trade, e.g., oilmongers, milkmen, yarn brokers etc. Chit-funds are also organized on a territorial basis, the chit being thrown open to a large body of persons residing in a particular area. In recent years, Co-operative Societies registered under the Co-operative Societies Act have adopted this exceedingly popular, ancient and indigenous institution for the benefit of their members. Perhaps this was the only institution in addition to the village money-lender which provided credit to the Indian villager for some centuries in the past.

It is somewhat surprising that attempts should have been repeatedly made to undermine the prestige and utility of this institution on two very technical grounds which all but succeeded to stifle the Chit funds in the country.

In its simplest form the chit arrangement is a co-operative effort for providing credit. Any number of persons, say twenty, join together and agree to pay each a certain sum of money, say one rupee, every month, and also agree that every month, the entire amount of subscriptions realized should be given as a loan to one of the twenty persons to be chosen by drawing lots, the person who receives the amount being liable to continue his monthly payment until every one of the persons so agreeing draws his lot and receives his amount. The leading persons who bring together the members of a Chit-fund may participate along with other members without claiming or reserving for themselves any special or extra benefits. But in some cases, the one or more persons who are responsible for the inauguration of the Chit-fund who are known as the stakeholders or the proprietors and in the vernaculars by different names connoting the rights reserved for them and the obligations incurred by them. The proprietor may reserve to himself the right of receiving the first preference in drawing the money without submitting himself to the obligation of the lot. In some cases by guaranteeing to each individual subscriber that the other subscribers will duly perform their contracts, he may reserve for himself additional benefits of various kinds. The Chit-fund is not always of the simple type described above. Ever so many variations and modifications which human ingenuity can suggest are incorporated to make the Chit-fund more attractive to the subscribers or more profitable to those who run it. One attractive variation is the introduction of the element of competition displacing the element of chance in drawing out. Every month, there may be a bid, on a competitive basis among the subscribers, the person to draw the amount being he who agrees to pay the highest rate of interest on the amount drawn or agrees to allow the largest amount of deduction on the amount drawn, the profit thus earned being divisible among the subscribers. There

can be no question of illegality on the ground of lottery in these auction chits. But another variation that is commonly found and very often brought to the notice of Courts is where an element of chance depending on the drawing of lots is deliberately introduced with a view to attract subscribers who take the risk of paying a stated amount every month for a stated number of months and draw at the end of the period the amount paid by them without any interest in view of the possibility of their drawing one or more prizes which would enable them to draw very much more than what they have paid in with no obligation for making any further payments. To give a concrete example we may refer to the Chit fund which came up before the Madras High Court in *Shanmuga Mudali* v. *Kumaraswami Mudali* (1). In that case, A and B promoted what was described as a Chit-fund. A capital fund of Rs. 500 a month was raised by 500 subscribers, subscribing each Re. 1 per mensem. At the end of each month there was a drawing by lot and the subscriber who drew the ticket was paid Rs. 50 and his connexion with the transaction forthwith ceased. This process was repeated month after month for 49 months and at the close of the 50th month each of the remaining subscribers was paid Rs. 50 and the stakeholders divided the profit and the fund was dissolved. Various other alterations are introduced in various Chit-funds to suit the condition of the subscribers or the avarice of the promoter. In all these Chit-funds the person who draws is determined by lot, and by lot the lucky person gets a lump sum often far in excess of the amount paid by him.

Chit transactions of these kinds were from time to time attacked on different grounds. All the same they have survived all these attacks. Each decision may have caused a great deal of doubt and difficulty, but no pains were spared by promoters and subscribers to circumvent the decisions by introducing distinguishing features.

The earliest attempt to declare that Chit-funds were illegal associations under S. 4 of the Companies Act of 1882 was in *Ramasami Bhagavathar* v. *Nagendrayyan* (2). That was a case where the stakeholder sued to recover the balance of subscription and interest due in respect of a chit by a subscriber who got his prize and was paid the money, on himself and his surety executing the suit-bond as security, for the due payment of the subscriptions. The District Munsif who heard the case overruled the contention that the suit was not maintainable as the Chit-fund was constituted in contravention of S. 4 of the Companies Act and decreed the suit. In revision, the learned Judges of the Madras High Court held that the Chit-fund was a Company of more than 20 persons carrying on business for the purpose of gain and that, therefore, was illegal for want of registration. The Munsif's decision was reversed and the plaintiff's suit was dismissed. Mr. Bhashyam Ayyangar (as he then was) appeared for tbe plaintiff-respondent and argued relying upon *Shaw* v. *Benson* (3) that the Chit-fund was perfectly legal as the business was not carried on for the purpose of gain either to the Association or to the individual members of it. He suggested that the real object which subscribers to a Chit-fund have in view is not the chance of an early drawing of the lot, but the securing of a safe deposit for savings and the consequent inducement to save money. The learned Judges, however, did not accept this argument and held that the Association was for carrying on business for the purpose of gain and that, therefore, was illegal on account of non-registration.

The hardship of this decision was largely mitigated by the decision of the Madras High Court in *Panchena Manchu Nayar* v. *Gadinhare Kumaranchath Padmabhan Nayar* (4). Without saying anything about the correctness or otherwise of the decision in 19 *Mad.* 31 their Lordships distinguish that case on the facts. The Chit-fund scheme in 20 *Mad.* 68 was evidenced by a document which described the scheme as "a programme of lottery" to be conducted by the proprietor on the lines already indicated as typical of these Chit-funds. Their Lordships treated this as a contract entered into between the proprietor and the subscribers and that there was no Company or Association at all which required registration. The proprietor's suit for

(1) A. I. R. 1925 Mad. 870.
(2) [1896] 19 Mad. 31=5 M. L. J. 275.
(3) 11 Q. B. D. 563, 570=52 L. J. Q. B. 575.
(4) [1897] 20 Mad. 68=7 M. L. J. 26.

the recovery of the balance of subscription due was decreed. It may be here noticed that even though S. 294-A of the Indian Penal Code had then been enacted no objection was taken to the legality of the Chit-fund on the ground that it amounted to a lottery and was, therefore, opposed to public policy.

The view taken in 19 *Mad.* 31 was reaffirmed and followed by two other eminent Judges in *Narayanasamy* v. *Jambu Aiyan* (5). In this case the terms of the Chit-fund were interpreted as constituting the proprietors and the subscribers into an Association coming within the mischief of S. 4 of the Companies Act. The case in 20 *Mad.* 68 was distinguished on the ground that the proprietor was the only person who was carrying on the business for his personal benefit.

In this state of conflicting authorities one can well imagine what an amount of doubt and uncertainty should have prevailed among the thousands of persons who were enjoying the benefits of this useful institution. A Full Bench of the Madras High Court cleared up the doubts created by 19 *Mad.* 31 and 11 *M. L. J.* 130 in *Neelamega Sastri* v. *Appiah Sastri* (6). The instrument evidencing the agreement amongst the members of the Chit fund was very similar to the agreement in 19 *Mad.* 31. Nevertheless the learned Judges placed a benevolent construction on the terms and held that though the organisers of the Chit-fund in question were described in the instrument as agents, the terms of the instrument taken showed that they really occupied the position of principals or proprietors. This decision closed the matter once for all and the objection relating to illegality on account of non-registration has not been raised since then in any reported case. Chit-funds secured a longer lease of life.

Another objection, often trotted out, is based on the ground that these Chit-funds are lotteries which are prohibited in law and which are opposed to public policy. This is no doubt a more formidable objection and furnishes an instance where the strength of persistent public opinion has mitigated the rigour of technical law. Act V of 1844 laid down that "all lotteries not authorised by Government shall from and after the 31st March 1844 be deemed and are hereby declared cammon and public nuisances and against law." The legality of Chit-funds in view of this prohibition was considered in *Iyyanar Kone* v. *Vidoomada Cone* (7). The learned Judges expressed the opinion that "the scheme is a provident and beneficial arrangement under which each member derives the advantage of having the use in his turn of a round sum, the only thing determined by lot being the turn in which that advantage shall be enjoyed." In 1864 when the matter again came up before the Madras High Court in *Kamakshi Achari* v. *Appavu Pillai* (8) their Lordships held that such a Chit-fund was not illegal merely because some matter is agreed to be decided by lot. The legal effect of the ordinary Chit-fund transactions is clearly explained in the following passage. "By the arrangement all get a return of the amount of their contributions. It is simply a loan of the common fund to each subscriber in turn and neither the right of the subscribers to the return of their contributions nor to a loan of the fund is made a matter of risk or speculation. No loss appears to be necessarily hazarded nor any gain made a matter of chance, except perhaps as regards the payment of interest which is only an ordinary incident of the contract of loan ; and the benefit in this respect, all, it seems, are intended to enjoy alike. The drawing of lots appears only to be made the means of deciding the order or turn in which the loan is to be made to each member."

For nearly 35 years the bogey of illegality did not rear up its head. The enactment of S. 294-A of the Penal Code corresponding to Act V of 1844 enabled the defence of illegality to be raised again. The District Judge of South Malabar in 1896 held that a chit-fund agreement constituted a lottery within the meaning of S. 294-A of the Penal Code. When the matter came up before the High Court in *Vasudevan Nambudri* v. *Mammod* (9), their Lordships tersely observed "the law as laid down in *Kamakshi Achari* v. *Appavu Pillai* (8) has been followed without question for 35 years. The introduction of S. 294-A into the Penal Code makes no difference.

(5) [1901] 11 M. L. J. 130.
(6) [1906] 29 Mad. 477=16 M. L. J. 385=1 M. L. T. 287.
(7) [1858] Sud. Dec. 53.
(8) 1 M. H. C. R. 448.
(9) [1899] 22 Mad. 212.

The Courts uniformly recognised the legality of these chit-funds and granted relief in connexion with various matters arising out of Chit-fund contracts. In *Periasami Thalavar* v. *Subramanian Asari* (10) the High Court went to the length of even enforcing the penal clauses in a Chit-fund agreement accepting by implication the legality thereof.

In *Krishna Iyer* v. *Ramaswami* (11) the High Court went to the extent of strictly enforcing the rules of a Chit-fund recognising even the quasi-judicial authority of the proprietors of the fund on the question of the sufficiency of the security to be furnished under the rules to their satisfaction.

One would have thought that there could possibly be no further doubts on this question. But unfortunately in *Sankunni* v. *Ikkora Kutti* (12), Phillips, J., resusciated the old controversy. It was a case in which the respondent was not represented and all the relevant authorities were not placed before the Court. In that case, one subscriber at each of the first 99 drawings received something more than what he subscribed, the amounts varying from 4 as. to Rs. 24-12-0. His Lordship thought that though all the other subscribers eventually got back their money without interest, some of the subscribers got prizes in excess of their subscriptions. The prizes being determined by lot, his Lordship held that the chit-fund amounted to a lottery and was illegal and that no suit is maintainable by a subscriber to recover money paid by him to a stake-holder.

Although this question might have been raised in the subsequent case *Vaithinatha Iyer* v. *Govindaswami Odayar* (13) neither the learned Judges nor the learned vakils thought fit either to reo-pen this question or even to refer to the decision of Phillips, J., reported in 10 *L. W.* 155. On the other hand the case in 42 *M. L. J.* 551 recognised the legality of the chit-fund in question and enforced the terms of the agreement. This decision was expressly referred to and followed in *Ramalinga Adaviar* v. *Meenakshisundaram Pillai* (14).

(10) [1904] 14 M.L.J. 136.
(11) [1914] 27 M. L. J. 447=(1914) M. W.N. 716=1 L. W. 818.
(12) [1919] 10 L. W. 155=37 M. L. J. 209=1919 M. W. N. 570.
(13) A.I.R. 1922 Mad. 67=42 M.L.J. 551.
(14) A.I.R. 1925 Mad. 177=47 M.L.J. 833.

The solitary judgment of Phillips, J., was not referred to or followed in any case until it was brought to the notice of Coleridge J., in *C. R. P. No.* 243 *of* 1922. The learned Judge took the view that that decision required re-consideration and referred the case to a Bench. The matter came up before Krishnan and Odgers, JJ., in *Nagappa Pillai* v. *Arunachalam Chetty* (15). In that case, the Chit-fund had 500 subscribers, each paying Re. 1 a month. The Chit was to last for 50 months during which period two prizes were to be drawn by lot, of Rs. 25 each among the subscribers every month. Any subscriber who happened to win a prize was paid Rs. 25 at once and was thereafter to pay only a subscription of 8 as. a month. If he won a second prize he would be paid Rs. 25 more and his subscription ceased and his name would no longer be included in drawing the prizes. At the end of the 50th month all the subscribers who had won no prizes were to be paid back the whole of the money they had subscribed, namely, Rs. 50 each: the single prize-winners were similarly to be repaid Rs. 25 each. Krishnan, J. held that the Chit-fund amounted to a lottery as far as the giving of prizes was concerned. He took the view that while a suit for recovery of a prize will be barred, a suit for recovery of either the balance of subscription due by a subscriber or for the recovery of the amount payable by the stake-holder will not be barred as the transactions are severable and the legal transactions can be enforced though the illegal transactions cannot be. Odgers, J., went further and held that the transactions are not so severable and that no suit for any relief whatsoever is maintainable as the Chit-fund is illegal and amounts to a lottery. This decision caused a good deal of inconvenience and uncertainty. Legal practitioners and Judges felt grave doubts and misgivings in dealing with the law on this subject in view of the aforesaid judgments of Phillips, J. and Krishnan and Odgers, JJ.

The Madras High Court again gave much welcome relief by the judgment of a division Bench in *Shunmuya Mudali* v. *Kumaraswami Mudali* (1). The facts in this case are almost identical with the facts in the case in 47 *M. L. J.* 876. The judgment of Venkatasubba Rao, J., at page

(15) A. I. R. 1925 Mad. 281=47 M. L. J. 876.

874, contains a lucid analysis of the essential features of the transactions. As his Lordship observes : "The element, therefore, that is generally present in a lottery or a wagering transaction, namely, that loss is occasioned to one or more does not exist in this transaction." His Lordship, if we may say so with respect, lays down the argument in a nut-shell in the following passage : "The fact that emerges from this description is that while chance determines the disposal of the interest earned there is absolute certainty with reference to the distribution of the capital fund itself. Though it may be said that it is the small element of chance that tempts some to join the fund, the dominant feature of the transaction is that it enables a large number to gradually lay by money and receive their savings in a lump sum and the scheme is in their case an incentive to thrift."

In this case their Lordships reviewed the entire English and Indian case-law on the subject and dissented from the views expressed in *Sankunni* v. *Ikkora Kirtti* by Phillips, J., and in *Nagappa Pillai* v. *Arunachalam Chetti* by Krishnan and Odgers, JJ. This considered and exhaustive judgment appearing in the authorized series will no doubt settle the law on the subject. It is hoped that neither the Bench nor the Bar will permit this matter to be again re-opened. If, for any reason, on account of there being two conflicting Bench decisions it is found necessary to refer the question to a Full Bench, we hope that the authority and the reasoning of the decision in 48 *Mad.* 661 will prevail in view of the considerations set forth above.

The Conflict between Order 17, Rule 2 and Order 17. Rule 3.

There is no subject on which judicial opinion has differed so widely as on this. It must strike the lay-mind that these rules have been applied in many cases, not correctly, and that the contrary opinion to what was held in those cases should have been held. In every case the question derives its importance from the circumstance that the appropriateness of the remedy resorted to, to set right the order passed by the Courts, is challenged ; when an application is made to the Court which passed the order, to restore the suits as if dismissed for default, the plea is usually raised that the disposal was under O. 17, R. 3 and that the aggrieved party's remedy is by way of appeal or review. When an appeal is preferred against the order dismissing the suit, the plea is with equal ingenuity raised that the order does not amount to a decree and that no appeal lies. If the Court makes up its mind one way or the other, as it must, it becomes too late for the party to pursue the other remedy that is available to him.

There is no uniformity of judicial opinion as to the conditions which justify the use and application of O. 17, R. 2 as well of O. 17, R. 3. In one view the application of O. 17, R. 3 is not justified unless the suit has been adjourned for the production of the evidence, &c., of the one party or the other at his instance and there are materials on the record on which the Court could come to a decision on the merits. Both conditions are treated as essential to the application of O. 17, R. 3. In this view a decision on the merits is of the essence of the application of O. 17, R. 3. So far as Calcutta is concerned, this view derives its strength from the exhaustive judgment of Mookerji, J., in 34 *Cal.* 235 and from the ruling reported in 41 *Cal.* 956. In Madras, the correctness of this position was doubted by Justice Krishnaswami Aiyar in 33 *M.* 241, but the Full Bench case in 41 *M.* 286, if read between the lines, makes it clear that one of the conditions for invoking O. 17, R. 3 is that the Court must be able to pass, and must have passed, a decision on the merits. This Full Bench case quotes with approval 41 *Cal.* 956. It further points out that the Courts ought to be cautious in the application of O. 17, R. 3 as it is a more drastic dealing with the matter. It gives the direction that, whenever possible, O. 17, R. 2 should preferably be used. In 2 *L. W.* 1061, decided before the Full Bench case, it is laid down that the

essence of an order under O. 17, R. 3 is a decision on the merits. In Patna the view is strongly emphasized in 1922 *Patna* 2, that a Court makes a mistake in applying O. 17, R. 3 where there are no materials on the record for it to come to a decision on the merits. The fact that the plaintiff's pleader reports no instructions if an application for adjournment is refused, does not, in the opinion of his Lordship, Justice Das, entitle the Court to usurp jurisdiction under O. 17, R. 3, and decide the suit on the merits.

Another distinction that is drawn by Judges between O. 17, R. 2 and O. 17, R. 3 is that in the former case an adjournment must have been necessitated by the exigencies of Court business, and in the latter case the adjournment must have been granted at the instance of one of the parties to enable him to produce his evidence or do whatever else is necessary to advance the trial of the suit. But one cannot say from the heap of the decided cases whether the distinction has been strictly adhered to. If, notwithstanding the circumstance that an adjournment was necessitated by the exigencies of Court business, the plaintiff's pleader appeared on the adjourned date of hearing, but was unable to give evidence in proof of his case, nevertheless took part in the trial, and the Court came to a decision on the merits, it would not be said that there was a disposal under O. 17, R. 2. The reason is that there is no failure of appearance on the part of the plaintiff or his pleader. It is clear therefore that failure of appearance on the part of plaintiff or his pleader is to O. 17, R. 2 what the existence of materials on the record to pass a decision on the merits is to O. 17, R. 3.

It sometimes happens that a Court passes no judgment on the merits owing to the absence of materials on the record, but at the same time it is impossible to say strictly that there has been a failure of appearance of the party or his pleader. The commonest case where a party appears by his pleader on the adjourned date and on being refused an adjournment reports no instructions is easy enough. Such is the case reported in 23 *Bom.* 414 and 3 *M. L. T.* 225. But where a pleader applies for an adjournment which is refused, and thereafter neither reports no instructions nor takes part in the trial, and the party is either present in the Court or not as the case may be, it becomes difficult to consider whether there has been failure of appearance in such circumstances to justify the disposal of the suit under O. 17, R. 2. In some of the cases it appeared from the judgment and the order that the disposal was not on the merits. It appeared also from the notes that the adjournment was refused, but that the pleader had not reported no instructions and that the party was still present in Court. In 18 *L. W.* 209 Justice Odgers was inclined to hold that in such a case there was no failure of appearance and that the Court was bound to give a decision on the merits. A case in 26 *M.* is followed in this decision ; but the later case in 30 *M.* 274 would appear not to have been argued and is therefore not noticed in the 18 *L. W.* case. Mr. Sundara Aiyar tried to argue in 30 *Mad.* 274 that the order was on the merits. The plea was not accepted by the Court. It was held that as the pleader was not able to answer all material questions relating to the suit he could not be said to appear ; and that the presence of the party did not matter, as if the pleader did not appear it could not be said that the party did appear. They looked also to the substance of the order passed and held it was a dismissal for default under O. 17, R. 2. On precisely similar reasoning the Patna High Court held in 4 *Patna Law Journal* 712 that the disposal was under O. 17, R. 2. In a later case in Madras 20 *L. W.* 795 decided by his Lordship Justice Venkatasubba Rao the pleader had not reported "no instructions"; but his Lordship held that there was no magic in the phrase and that nevertheless there was no appearance. 50 *M.* 274 was followed as good law. A converse case is the one reported in 1925 *Madras* 366 where a pleader applied for time and reported no instructions on adjournment being refused. The Court proceeded nevertheless to decide the matter on the merits and came to a conclusion accordingly. Their Lordships held that the disposal was under O. 17, R. 3. If 1922 *Patna* 2 is right the Court ought not to have invested itself with jurisdiction to try the suit under O. 17, R. 3, directly it found that by plaintiff's pleader reporting no instructions and the plaintiff being absent there was a failure of appearance by party or pleader, the Court ought to pass an order under O. 17, R. 2 disposing of the suit in

one of the modes directed by O. 9 or make such other order as it thinks fit, which means no more and no less than granting a further adjournment of the suit : vide 1922 *All.* 68. In 3 *L. W.* 524 the Court wrongly decided a suit under O. 17, R. 3. The High Court said that even though the decision was wrong the remedy of aggrieved party was by way of review or appeal and not to treat the order as one passed under O. 17, R. 2. As pointed out by the Full Bench in 41 *M.* 286 the Court ought to exercise caution in the application of O. 17, R. 3.

DRAWER'S AND ENDORSER'S LAIBILITY

as surety under

The Negotiable Instruments Act

When a person undertakes as guarantor or surety liability for the performance of an obligation on behalf of another who is the principal debtor, his liability is, in the absence of a contract to the contrary, co-extensive with that of the principal debtor ; the creditor has the right to enforce from him the performance of the obligation as he can from the principal debtor. All that the surety can do, if he was called upon to perform and did accordingly perform the obligation, is to be entitled to the equities that the creditor had against the debtor. The surety is, so to say, subrogated to the position of the creditor. He can sue to reimburse himself for the losses he has incurred on behalf of his principal.

This liability of the surety is curtailed by certain conditions in the case of drawers and endorsers under the Negotiable Instruments Act. The drawer is a surety for the acceptor who is the principal debtor. The endorser is likewise a surety so far as the endorsee is concerned, as the latter has the right to enforce payment under the bill from him (the endorser) as from the acceptor or drawer. But the mere act of drawing or endorsing on the instrument does not make the drawer or endorser liable as a surety. When a drawer draws a bill to the order of another, and it is accepted by him on whom it is drawn, the drawer undertakes to the holder that the acceptor will honor the bill when due, and pay according to the tenor of the instrument, and that if he does not honour the bill, the drawer will compensate the holder for the loss sustained by the dishonour. On the acceptance of the bill, the liability under it is shifted from the drawer to the drawee or acceptor, and the drawer's liability as a surety may arise only in the event of the dishonour of the bill by the acceptor. When the bill is dishonoured by the acceptor, the holder or payee becomes entitled to question the drawer about his assurance and undertaking conveyed through the act of drawing. If the payee so likes, he may not so question him. He may continue to look to the acceptor alone for payment. He may be satisfied to all intents and purposes as to the solvency of the acceptor, and so long as he does not intimate in legal form, the drawer, that he proposes to hold him to his original assurance, in other words, to make him liable on the bill, the drawer goes free. Unless the payee performs this further act of volition, viz., communication of a notice of dishonour to the drawer, the latter may never become liable.

The liability of a drawer as surety, under a bill turns on two things then : (1) a default or dishonour of the instrument by the acceptor ; (2) a further act of volition on the part of the payee intimating to the drawer that he will be made liable, technically called, notice of dishonour, which is of the essence of the liability of the drawer. The reason is that even on dishonour the payee may continue to look to the acceptor alone for payment.

When a drawer is obliged to pay the amount due under a bill, in consequence of the dishonour by the acceptor, he gets the right to be compensated by the acceptor for the losses he has suffered. The measure of compensation in either case is ascertained with reference to S. 117 of the Act. But in order that the drawer may exercise this right against the acceptor, the drawer must have made the payment when he was liable in the eye of the law, If his liability as a surety had not arisen, either by the default not having occurred, or by the notice of dishonour not having been given, and he nevertheless

paid the amount covered by the bill, his payment is only a voluntary payment and he does not become entitled to reimbursement. The drawer is not to suppose himself to be liable and make a payment, when he was not really liable in the eye of the law. A volunteer cannot claim the benefit of subrogation to the rights of the creditor. In order that the drawer may found a valid claim on the bill he must show that he paid for another under a liability which had arisen. It is here that the point of distinction lies.

In his terse and crisp judgment in 19 *Cal.* 146 Trevelyan, J., makes this point very clear. His Lordship says that the "dishonouring is not the natural consequence of drawing." He points out that the mere act of drawing does not invoke the liability of the drawer as a surety; so, where a drawer pays when he is not liable, supposing himself to be liable, he cannot claim re-imbursement from the acceptor. In the English case of *Horme* v. *Rocquettee* this position is stated with unmistakeable clearness. S. 32 of the Negotiable Instruments Act and Ss. 55 and 57 of the Bills of Exchange Act leave no room for doubt as to the correctness of this position. In Halsbury's Laws of England, Vol 11, page 524, the same proposition is stated with clearness.

The dishonour of a bill may be by non-acceptance or by non-payment. When the former kind of dishonour occurs, the condition for the liability of the drawer as surety has arisen. It is not necessary for the payee to wait till the due date for the possible acceptance of the bill by the drawee, nor is it necessary for him to give him a fresh notice of dishonour by non-payment. Notice of dishonour by non-acceptance is sufficient to make the drawer liable: 20 *Bom.* 133.

P. V. Aghoram Aiyar, B. A. B. L.
Vakil, Palghat.

REVIEWS OF BOOKS

The Punjab Municipal Act (Punjab Act III of 1911 as modified up to the 4th May 1923), with **Small Towns Act** (Punjab Act II of 1922) by Hari Chand, M.A., LL. B., Vakil, High Court. Second edition. Published by the author, Lahore, 750 pages, Royal 8vo.

We welcome the second edition of this useful commentary on *the Punjab Municipal Act*. In view of the increasing public interest in municipal affairs and in view of the paucity of books on the Provincial Municipal Acts those interested in the municipal affairs of the Punjab will find this book exceedingly useful. The book, though professing not to be quite exhaustive, is really adequately complete for all practical purposes. English cases are very freely referred to whenever necessary and the references to the Indian Case-law are full. Under each section the author gives the corresponding provisions of the several Provincial Municipal Acts. The notes under each section are lucidly written and clearly arranged for easy reference. The sections of the Act are printed in thick bold type.

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NOTES AND COMMENTS

PRECEDENTS

"One of the most valuable principles pervading jurisprudence, is . . . . . that Judge is best, who relies as little as possible on his own opinion."

"That august tribunal (the people) is eternally sitting in judgment on the conduct of all public functionaries, and their judgments are recorded in public opinion."

The American Law Review, Volume LIX, Part No. 6, pp. 897 and 899.

LAW REPORTING RULES

M. L. Journal (*Vol.* 21, *page* 183) (1911)

Some of the Editors: P. R. Sundara Aiyar; T. V. Sheshgiri Aiyar; K. Srinivasa Iyengar, afterwards Judges of the High Court at Madras: S. Srinivasa Iyengar, lately Advocate General Madras.

As a general rule, cases turning upon *evidence* or *inferences of fact*, cases relating to the *construction* of private documents, and, generally, cases which do not illustrate some principle of law or some important bearing of an enactment in a way *not covered* by previous decisions, ought not to be reported.

In selecting cases for report, the Reporters are te be guided by the weight and importance of the decision, and the existence of materials, for a satisfactory report, and are not to abstain from reporting a case merely because they may think the decision to be *erroneous*, or to be in *conflict* with other decisions.

Articles

Study of Mimamsa and Research and Reform in Hindu Law

[*Lecture delivered by Mr. D. W. Kathaley B.A., LL.M., Advocate and Joint Secretary, Hiudu Law Research and Reform Society, Nagpur, C.P.*]

* * " The first important point upon which I am required to tell something to you is about the Mimamsa rules of interpretation We often think that the question of interpretation is a very simple one. Many people think so, but it is not. We have got a wakf case in Nagpur, and it is now pending before the Judicial Commissioner's Court. The question is whether the wakf operates in presenti or whether it operates after the death of the person who made it. If one construction is accepted, one party will get an estate worth Rs. 70,000, if another construction is accepted, the other party will get it. The questions of construction arise not only in India but in many other countries as well and the subject is one of great importance. All points about construction are not, however, very difficult to solve. When the Saracens invading the Roman Empire under the leadership of Mohamad II reached Venice, the Venetian Governor promised to surrender " on the condition that Mahamad should not cut off his head." Mohamad agreed and kept his word ; he never cut off the head of the Governor but only sawed him by means of a saw and made two pieces of his head. Similarly, Tameslane once buried alive a garrison only in order to keep his promise to shed no blood (1). These are very simple constructions but are they right ? You know the Muhammadans are required to keep the rozas (fast) in the month of Ramzan ; the Koran has asked them to observe fast during the day, but what some of them do is to eat from 7 in the evening to 5 in the morning. They strictly obey what has been written in the Koran. It will thus appear that the question of construction is not so simple as it is usually considered. Hence the Privy Council has rightly laid down that the question of construction is a substantial question of law : *Fateh Chand* v. *Kishan Kunwar* (2). Hence the necessity of the rules of construction. The Mimamsa writers have said:

केचिदाहुरसावर्थः केचिन्नासावयं त्विति। तन्निर्णयार्थ-
मप्येतत् परम् शास्त्रं प्रणीयते॥ **कुमारिलभट्ट.**

"Some people contend that this is the meaning of the sentence, others that this is not the meaning. It is for this purpose that the science of construction has come into existence." On the point of construction of texts of Hindu Law the Privy Council observed in a case which went to them from this place "The Hindu Law contains its own principles of exposition, and questions arising under it cannot be determined on abstract reasoning, or on analogies borrowed from other systems of law, but must depend for their decision on the rules and doctrines enunciated by its own law-givers and recognized expounders" *Ramchandra* v. *Vinayak* (3). This is what we want to do. An effort was made in this direction by the Calcutta University, and in 1905 a Tagore Professor of Law, who is paid Rs. 10,000 was appointed to deliver lectures on the subject of Mimamsa Rules of Interpretation. Mr. Sarkar delivered those lectures. His work is well known in legal circles. The author is dead and there is no chance that the book will be reprinted again. The book is out of print ; it originally cost Rs. 10 only, but now you have to pay Rs. 40 if a copy is available. It may now be taken as settled that if you want to place a proper construction upon the rules of Hindu law you must construe them in accordance with the principles which were laid down by our own Rishis. In a Madras case, which went to the Privy Council, the question arose as regards the proper meaning of the expressions used in the Will by a testator and Lord Moulton delivering the judgment of the Privy Council observed as follows : " In all cases the primary duty of a Court is to ascertain from the language of the testator what were his intentions, i.e., to construe the Will. It is true that in so doing they are entitled and bound to bear in mind other matters than merely the words used. They must consider the

(1) Maxwell's Interpretation of Statutes, Fifth Edition, page 31 Ed.

(2) [1912] 34 All. 579=39 I. A. 247 (P.C.).

(3) [1914] 42 Cal. 384=41 I.A. 290 (P.C.).

surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure. "The Court is entitled to put itself into the testator's armchair." Among surrounding circumstances which the Court is bound to consider none would be more important than race and religious opinions, and the Court is bound to regard as presumably (and in many cases certainly) present to the mind of the testator influences and aims arising therefrom." *Narasimha* v. *Parthasarathy* (4). Now, if this is the law as regards the construction of documents executed by ordinary persons, do you think that similar principles should not be applicable to the rules of law which have been laid down by the sages. Writers on Hindu Law, i.e., the sages who wrote the Smritis or the subsequent commentators who commented upon the ancient Smritis always used the rules laid down in the Mimamsa and a cursory reading of Sarkar's Principles of Mimamsa Interpretation will show you that Vidnyaneshwar, Jimutwahan, Nilkanth, Medhatithi, Raghunandan, Apasthamb and Bodhayan have referred to the Mimamsa rules in arriving at conclusions regarding the meaning of the expressions used in the Smritis. They knew that unless they took their seat in the armchair of those sages who wrote the Smritis they would not be able to arrive at correct conclusions. But though this is so, the study of Mimamsa has been neglected, and it has been neglected like many other valuable branches of learning about our ancient culture. Now we are trying to revive that ancient culture. You know that sometimes the foreigners take more interest in our culture than we do. In order to preserve ancient monuments, Lord Curzon passed an Act. Indians are, however, now feeling the necessity of reviving the study of Mimamsa. Dr. Sir R. G. Bhandarkar said: "I think there ought to be such an institution in connexion with the Dharma Shastra in which the most important treatises on religious and civil laws should be taught, and the rules of interpretation given by the Mimamsakas applied, for the legal points", and Dr. Ganganath Zha has remarked "Without a full grasp of the principles evolved in the Mimamsa Shastra, no intelligent study of Dharma Shastra is possible". Sir Lallubhai Shah, Acting Chief Justice of the Bombay High Court, said in regard to Waman Shastri's Mimamsa School; "I wish you all success in your efforts to start Mimamsa Vidyalaya".

In the well-known case about the adoption of an only son the Privy Council said about Jaimani that he has been received as a high authority in the interpretation of the Smriti texts and the rule laid down by him, to the effect that all precepts supported by the assignment of a reason are to be taken as recommendations only, if sound, would be conclusive as regards the interpretation which was put in that case upon the texts of Vasishta: *Balusu Gurulingaswami* v. *Balusu Ramalakshmanna* (5).

Now the rules which are stated in the Mimamsa are not so extraordinary as to puzzle us; many of them are quite simple. In the Courts in Nagpur a question has arisen as regards the point whether a suit for a portion of an occupancy holding is governed by two years' limitation as laid down in the Local Tenancy Act, or by 12 years' limitation as laid down in the limitation Act, the contention being that the rule laid down in the Tenancy Act applies to a whole holding and that it does not apply where only a portion of the holding has been encroached upon, as the Act does not make mention of a portion of the holding. When a holding, say consisting of 10 acres, is taken possession of by a trespasser, the attention of the tenant is at once drawn to the fact of his dispossession and if you apply to such a case the rule of limitation laid down in the Tenancy Act it is all right. But if a person surreptitiously goes on trespassing upon his neighbour's land, and takes up an acre in one year and another acre in another year and so on, it does not attract the attention of the tenant to the encroachment and there is no reason why you should apply the rule of two years to such a case. Now you will be surprised to find that this point was argued before one Judge. Once he held that two years rule was applicable, but on another occasion he was

(4) [1914] 37 Mad. 199=41 I. A. 51 (P.C.).

(5) [1899] 22 Mad. 398=21 All. 460=26 I. A. 113=3 C. W. N. 427=1 Bom. L. R. 226=7 Sar. 330 (P. C.)

inclined to think that his previous decision was incorrect. You will thus see that the task of interpretation in not so simple and there must be some rules laid down for the purpose of arriving at a correct conclusion as to the meaning of the law as laid down in the statutes. Now Jaimini has said 2000 years ago 100 includes 50 or the whole includes a part. If a suit for the whole of the holding is to be brought in two years, a suit for a portion must also be brought within two years. Another simple rule stated by Jaimini is that a word used by the sages is presumed to be used in one sense only. This rule was given effect to by the Privy Council in another case which arose in this province. It was held that the limitation of sapinda relationship laid down in the Mitakshara (Achara Kanda), i.e., that it ceases after the seventh ancestor on the father's side and the fifth ancestor on the mother's side is not confined to prohibition in respect of marriage, impurity, and exequial rites only, but applies also to inheritance : *Ramchandra* v. *Vinayak* (3). The principle that a word used in a book in different places is to be presumed to have been used in the same sense is found adopted by the Legislature and in the various statutes it is generally mentioned in the interpretation clause that unless a contrary intention appears from the context, a particular word is used in a particular sense throughout the Act. The simple rules of construction are of very great use in arriving at correct conclusions regarding the meaning of the text, and by applying them one can arrive at conclusions by a very simple process of reason, and a good deal of intellectual labour is thus saved. According to another maxim of interpretation if the context indicates that a word is used in a technical sense, then it should be interpreted in the technical sense and not in its literal sense. If this principle would have been observed in deciding the case reported in *Dattatraya* v. *Govind* (6), the Bombay High Court would not have held as it did that when a boy is given in adoption, he loses all the rights he may have acquired to the property of his natural father including the right to property which has become exclusively vested in him before the date of his adoption. The word हृ (hru) in Sanskrit literally means " to take," but the technical meaning of that expression is "to inherit."

The rights of the adopted son in such cases depend upon construction of Manu's text in Adhyaya 9, Slok 142 गोत्ररिक्थे जनयितुर्न हरेद्भ्रिमः सुतः। गोत्ररिक्थानुगः पिंडो व्यपैति ददतः स्वधा ॥ and if the first line of the Sloka is translated as it should be to mean that an adopted son should not inherit the property of his natural father, then you put a construction upon the text which is commendable not only to common sense, but which is also approved by the Judges of the Madras High Court in the case of *Venkata Narsimha* v. *Raja-Rangaya Appa* (7).

A careful study of the principles of interpretation is bound to serve a useful purpose on account of its applicability to the various concrete cases which arise in the Courts from time to time. Lawyers will remember that according to the numerous Privy Council decisions under the Hindu Law, clear proof of usage will outweigh the written text of the law. Now limitations of these propositions have not been brought to the notice of the lawyers in any book written on Hindu Law, while information on that point will be found in a Mimamsa work.

If the rule to the effect that clear proof of usage will outweigh the written text of the law were to be applied to the case of a marriage which took place between a Maharashtra Brahmin bridegroom and Bengali Brahmin bride, it will follow that the marriage will not be valid. The custom about such a union is ancient, certain and reasonable and thus it possesses all the necessary characteristics of a valid custom. The custom must have been in existence for at least one thousand years and it is more ancient than many other customs which are given effect to by the Courts. The custom is as certain as it can possibly be. It is also reasonable as the Maharashtras do not take the food to which a Bengali Brahmin will have no objection. It necessarily follows that a custom which has prohibited marriages between these two communities is reasonable. It is no doubt true that according to the various decisions of the High Courts, marriages amongst sub-castes are valid and legal. But if the question is discussed from the point of principles, it does not appear to

(6) [1916] 40 Bom. 429=18 Bom. L. R. 288.

(7) [1906] 29 Mad. 437=16 M. L. J. 178.

be so simple. If effect has been given to the various usages which have practically abrogated the textual law, why should not effect be given to the above usage according to which such unions are not approved? A gentleman who is a Mahamahopadhyaya was examined in a case which is now going on in Nagpur and who gave it out as his opinion that such marriages between the different communities are opposed to usage and are, therefore, invalid. If a person with these views about the sanctity of the usage becomes a Judge of the High Court and inclines to the view that the various decisions of the High Courts in which marriages amongst sub-castes have been held to be valid are erroneous inasmuch as they are opposed to the view taken by the Privy Council, according to which clear proof of usage outweighs the written text of the law, one can bring to his notice the discussion about the point in a Mimamsa work, *Bhatta Dipika* of Khand Deo.

There the author states as follows :

यद्यपि शास्त्रदृढिर्बलीयसीति वचनं पुरस्क्रियत तदपि न समजसमवगाहत । अपि तु यथा व्रीह्यपेक्षया तृणवृद्धिर्विशिष्यते तथापि कृषिबलस्ताम् निरस्य धान्यवृद्धावेव प्रयतते ॥

According to the author, if much stress is laid upon the rule that clear proof of usage will outweigh the written text of the law, one will find himself landed in difficulties. As an agriculturist in order to keep his crops in good condition removes the weeds and makes efforts only for the improvement of the crops, similarly a lawyer must find out what are the unnecessary excrescences which have come into existence since the time the textual law was written. If the limitations to be borne in mind as regards giving effect to various usages are borne in mind, it will be possible for lawyers or laymen to wage a successful war against numerous pernicious customs which have grown from time to time and which vary from place to place to such an extent that a traveller travelling from one end of the country to another will find them changed as often as he would change his horses.

A knowledge of the original text is, however, necessary in order to enable one to apply the Mimamsa rules for finding out the meaning of the text as well as for the purpose of reconciling the conflict of decisions. Whether the view about the liability of the son to pay the father's debts during his lifetime, as laid down in *Sahu Ram Chandra* v. *Bhupsing* (8) or *Brij Narayan* v. *Mangal Pershad* (9) is correct can better be decided if we try to find out what Yadnyavalkya said in Vyavaharadhaya, Slok 50, where it is laid down that the liability of the son to pay his father's debts arises after the death of the father. For the examination of the Degree of Master of Laws, almost all the Indian Universities have prescribed the ancient text of Manu, Yadnyavalkya, Mitakshara, Mayukh and others and those persons who want to make a further study on Hindu Law are necessarily required to have a knowledge of the original texts as far as possible.

As regards reform and research of Hindu Law, it is now high time that Indians should take upon themselves, the work of making research in their personal law and should not leave that work to be done by others In these days the importation of foreign goods is condemned from one end of the country to other, but no attention has been given to the fact that the books on Hindu Law regarded as authorities on Hindu Law are with the exception of one or two books, generally those written by Europeans.

Research in Hindu Law is not a matter of only theoretical interest but it is of practical utility. The idea generally prevails amongst the masses that the Hindu religion is unchangeable and that to day it is found in the same form in which it was thousands of years ago and that it will continue to be in the same form in future, and this impression, erroneous as it is, has been a great bar to our social reform and has made progress almost difficult. If research scholars tell us something about our law and religion in the past, it will prove really of very great use to us. In the Nagpur University extension lecture series, Dr. Bhandarkar of Calcutta delivered a lecture. It was illustrated by magic lantern slides and he showed us the photograph of an inscription which was to the effect that Heleodoras, son of Dion, who was a Greek Ambassador, accepted Hinduism and became a follower of

(8) [1917] 39 All. 437=44 I. A. 126 (P.C.).
(9) A. I. R. 1924 P. C. 50.

Wasudeo Dharma. If the fact that the Greeks became converts to the Hinduism is brought home to the Hindu public, few will then appear to make the statement that the Hindu religion is not a proselytizing religion. Though we take pride in the doings of our ancestors, we do not take any keen interest in knowing our previous history of law or religion. About ten years ago, the Calcutta University decided that a lecturer should be appointed to lecture on the Hindu Law from the Vedic times to the times of Manu, but no lecturer could be found to do the work, though the University kept on advertizing for the past five or six years. Our ignorance of our past may be very easily illustrated by a very small example : though several Hindus worship Ram as a God, they will not be able to tell anything about the dress worn by Seeta. Was she using the dress now worn by the Maharastra ladies, or was she dressing herself like a Gujerati or a Bengali lady or like the ladies in Upper India? Persons from the Hindi districts will at once say that Seeta came from Berar, she must be evidently wearing the dress which the ladies in Berar wear. But the people from Berar, might well contend that as Indumati, the paternal grandmother of Ram was from Vidharba, which is sometimes identified with Berar, she must have introduced the customs of Berar in Ayodya and so Seeta must be wearing that costume. Very few persons can be found who would give a correct answer to the above question.

Now, we come to the last point about the reform in Hindu Law. According to Hindu Law a daughter's son inherits the property, but son's daughter does not and similarly though a sister's son is an heir, sister is not regarded as an heir throughout the whole of India, excepting the Madras and the Bombay Presidencies, and if a rich person dies leaving behind him his sister and his only relation, the sister will not get the property and the Government will take possession thereof. In influenza or plague it sometimes happens that a person dies leaving behind him a son and a daughter and if the son dies afterwards, the daughter cannot succeed, because she is then the sister of the last male holder, but if the son would have died before the father, the daughter would have at once succeeded to the property. In a case from the Central Provinces, which came to my notice, a lady was going to lose the property worth Rs. 20,000 on the sole ground that being a sister she is not regarded as an heir under the Hindu Law. Similarly, though a mother succeeds as an heir to the property of her son, a step mother does not. The reason for excluding the females from succession is to be found in a text of Taitteriya Sanhita

(निरिंद्रिया: ह्यदायादा: स्त्रियोऽनृतमितिश्रुति:)

which is usually translated as follows: "Women are weak and therefore they are incompetent to inherit." According to the view of Bramharanya in the Madhaviya commentaration by Parashar-smriti (Adayada) (आदायादा) means incompetent to drink soma juice and has got nothing to do with the incompetency to inherit. This view commends itself to the approval of the general public and can be given effect to for the purpose of reforming the Hindu Law. According to ancient Hindu Law, which is now given effect to on the point of the incompetency of women to inherit a daughter-in-law will be considered to be "weak and therefore incompetent to inherit"; but Ahilya Bai Holkar succeeded as daughter-in-law and ruled better than many other rulers. Similarly Rani Laxmibai cannot be said to be weak in any sense of the term. If ladies in India can conduct government business, they cannot be said to be incompetent to inherit properties of small value.

Improvements are to be made not only in the law of inheritance, but also in other departments of Hindu Law. Though the adoption of a married man is permissible in the Bombay Presidency and Berar, it is not so in other provinces. The reason is that a person cannot adopt as his son, his nephew, if the nephew is married and is required to adopt a stranger. There should be no objection if adoptions of married men are legalized throughout India. Under the present law, a person who adopts a son to him, can will away his self-acquired property in favour of the stranger and thus disinherit his adopted son. This view works great hardship upon the adopted son and it is necessary to make a suitable provision for maintenance for the adopted son in such a case or otherwise put a limit on the power of the person making adoption to make a Will. As regards the law of debts, many families

have been brought to ruin, because the son's share in the ancestral property is sold away not for the realization of their debts, but for the satisfaction of the debts of their father who lead an extravagant life. Even if the father's debts are immoral, it is almost impossible to prove the nature of the debt and all immoral debts are recovered by the sale of the shares of the sons. It is very desirable that henceforth a father's debts should be realized only from his share in the joint property and not from the shares of his sons. The rule of damdupat which is enforced only in the Presidency towns, requires to be enforced throughout the whole of India. To use the language of a learned Judge the most cruel actions are constantly brought to enforce extortionate demand—actions in which the law so far from being as she ought to be the handmaid of justice is in reality prostituted and made an accomplice in the perpetration of the most iniquitous gambling and robbery, 36 *Mad.* 229 (236). In the well-known case of *Sahu Ram Chandra* (8), the mortgage was executed for Rs. 2,000, but the suit was brought for the recovery of Rs. 15,000. Unless the rule of damdupat is enforced, no stop can be put to such actions. The sensible nature of the rule has been appreciated by an eminent English Professor, Mr. Keith, who has recently contributed an article in the Journal of Comparative Legislation in which he has advocated the view that the rule of Damdupat should be enforced in all European countries. Recently a Bill for preventing an accumulation of interest has been introduced in the Council of State and let us hope that it will be passed. Coming to the case of marriages: it would be found that though inter-communal marriages between the different sub-communities have begun to take place, a new difficulty has arisen which was not felt previously. If there is a bridegroom belonging to the Ranade family (Maharastra Brahmin) and the bride belonging to the Mukerjee family (Bengali) a marriage between the two cannot possibly be celebrated under the Hindu Law, because Ranade and Mukerji have the same Gotra and the same Pravara. Cases of anomalies in Hindu Law can be multiplied and it is our imperative duty that we should try to make suitable changes in Hindu Law so that hardships of the kind above referred to may be prevented in future.

Reviews of Books

Reports of Income-Tax Cases

By P. R. Srinivasan, M. A., B. L., Vakil, High Court, Madras, Vol. I, 1886-1925: Price Rs. 10.

This is the first publication that has exhaustively collected all the judgments delivered in India so far on the three Income-Tax Acts of 1886, 1918 and 1922 and has not omitted decisions under the Excess Profits Duty Act nor the decisions of the Courts of Mysore and Travancore since the latter have adopted almost in its entirety the legislation in British India. The chronological order which has been adopted in the printing of the several cases and the comparative tables of the sections of the Acts of 1918 and 1922 and the sections of the English Income-Tax Acts will be very highly appreciated by the lawyer, the Judge and the Income-Tax department alike. These reports are specially welcome at this time when there are few decisions under the Income-Tax Acts of either 1918 or 1922. As pertinently observed in the introduction by the Hon. Sir Murray Courts-Trotter, the Chief Justice of the High Court of Judicature at Madras, the work is singularly free from the faults of printing, and the *Madras Law Journal* Press are to be congratulated upon the neat printing and the excellent get-up. The author proposes to issue supplementary quarterly volumes of cases that will be decided hereafter.

Sirkar's Code of Civil Procedure

By P. C. Sirkar, 6th Edition, 1925, published by Butterworth & Co., Calcutta : Price Rs. 20.

This sixth edition of the late M. C. Sirkar's Civil Procedure Code has maintained the reputation of the work being the most exhaustive on the subject. If the Commercial Press, with its usual small but neat type, had not come to the rescue it would have been impossible to condense the whole matter in one volume. Even as it is the total number of pages exceeds 2000, and looking to the number of pages the price of Rs. 20 is really very moderate. The present edition is brought out by the late author's son Mr. P. C. Sirkar. The improvements over the previous edition are that under the heading "commentary" the object and scope of each section or rule, and the principles on which they are founded, have been explained. The old law has been stated in order to help the reader to understand the gradual development of the law on any particular subject and the difference between the old and the new Codes. Decisions reported in the various private law journals in the different provinces of India have not been ignored. The method followed in the previous editions of this work of giving references immediately after giving the principle of the case is maintained in the present edition and has its own advantages, though much can be said in favour of the usual method of giving references in the foot-notes. On the whole this work seems to be the most moderately priced, and yet the most exhaustive among ths commentaries on the Code of Civil Procedure, and will, therefore, be useful to the Bench and the Bar.

Jottings

The Week End Habit.

"Mr. Lloyd George, speaking on Saturday, the 22nd Ult., thus referred to the week-end habit : "A man who had been working at high pressure in the town sought a week-end rest in the country. It soothed his nerves and tranquillised his whole temperament. He then went back to his work with firmer nerves and judgment. It was wrong to sneer at the English week-end habit, and it ought to convey its message to statesmanship." In the English week-end habit the House of Commons, whose tendency as representatives is not so much to lead as to follow the people, has taken the initiative in the establishment for itself of a week-end holiday which has for several generations been regarded as a parliamentary institution. The House of Commons may hold a sitting upon any day of the week : there is no statutory provision against the transaction of business even upon Sunday. Of course, the holding of a Sunday sitting is a matter of extreme rarity. There are a few such exceptional instances recorded (as in the event of the demise of the Crown on a Sunday) in each century, always under circumstances which account for their occurrence. For more than a hundred years, however, Saturday has ceased to be a regular working day and acoordingly the standing orders of the House of Commons expressly provide that no sitting shall be held on Saturday unless specially ordered by the House. The week-end habit of the House of Commons, of which the custom of treating Saturday as a holiday is an illustration, arose, as Mr. Speaker Onslow informs us, to accommodate the country tastes and desire for relaxation for an interval from the strain of official work felt by Sir Robert Walpole. The great Prime Minister's week-end was free so far as to be able to indulge his passion for hunting without interruption."

The Law Times—Volume 160, *p.* 174.

NOTES AND COMMENTS

PRECEDENTS

33 BOMBAY 122 (DAVAR, J.)

A judge sitting on the original side is bound ordinarily to follow the judgment of another Judge when he has decided a point of law, or laid down certain principles of practice or procedure or judicially construed any provision of the law prevailing in the country. But a single Judge is not bound to follow another Judge's finding of fact based on the evidence recorded by him, when the evidence that may be available before a Judge in a later case may be fuller or more reliable and may tend to lead him to a different conclusion.

5 *I. C.* 309 *at* 310=11 *C. L. J.* 106 (MOOKERJEE AND TEUNON JJ.)

The Courts must always hesitate to overrule decisions which are not manifestly erroneous and mischievous, which have stood for many years unchallenged and which from their nature may reasonably be supposed to have affected the conduct of a large portion of the community in matters relating to the right of property.

LAW REPORTING RULES.

Mad. L. Journal (*Vol.* 8, *page* 456) (1898)

Edited by V. Krishnaswamy Aiyar and P. R. Sundara Aiyar, afterwards High Court Judges, Madras; and Hon P. S. Sivaswami Aiyar; ex-Executive Councillor, M. L. A.

* * No case should be reported which *merely applies an ascertained rule of law to a new combination of facts*, unless, as sometimes happens in the development of modern science and trade, the facts are so novel that the application of the old rule thereto is in fact a development of the law. This rather vague principle may be better expressed as a rule of practice: "In deciding whether a case should be reported or not, *first* state the principle of the decision in abstract terms, without reference to the special facts of the case, and then ascertain whether this rule has been already authoritatively enunciated." In other words, before reporting a case try whether it is possible to write a decent head-note for it; and, though I am aware that the learned author of the Bombay Reports appears to be of a different opinion, * * a head-note should *state the ratio decidendi merely, and not consist of a precis of the facts, the authorities cited, and the judgments, occasionally enlivened with quotations from the last. See* (22 *Bom*, 850; 862, 899).

The appliction of this rule would prevent the multiplication of Reports dealing with the construction of particular documents; in such cases we often find the Court expressly declaring that one document cannot be used to construe another; and the English Courts will often refuse to look at previous authorities, on a mere question of construction. And yet it is common enough to find in a head-note "Held, upon the construction of the mortgage-deed, the parties intended, etc." "*See* 25 Cal. 246 and 248. Apparently the only reason for reporting the case just referred to was that a similar case was cited, that is, that a former Reporter had sinned in a similar manner. Cases which merely follow another case should not be reported, unless the latter be a decision of another High Court. * *

Articles

Presumption of death..

(*Velchand U. Mehta, Pleader* Ahmedabad.)

If a person disappears and there is forthcoming no intelligence of his existance, how are others to act ? How are they to deal with his property ? Should they continue to assume his living indefinitly or to assume his death after the lapse of a particular period ? How long succession to his property to be postponed ? Hindu-Law is very clear on the point. It lays down that after twelve years the person should be considered dead. The Hanafi Law puts down ninety years from the date of his birth, while the English Law lays down seven years. But *A. I. R.* 1923 *Mad.* 182, 43 *All.* 673 *etc.* abrogate the principles of the Hindu and Mahommadan Law on the question and substitute seven years instead, under S. 108, Evidence Act. So far so good if they put the Hindu and Mahommadan Law in line with the English. But the decisions reported in 22 *Bom. L. R.* 771 and 47 *Bom.* 451 and rulings of the High Courts they have followed have conjured up an amount of confusion. Relying on the wording of S. 108 Evidence Act, they say the presumption of death arises at the time the suit is brought, that it can have no reference as to a particular date, that it has no retrospective effect and that the person who wants the Court to assume the disappearing person to be dead at a particular time must prove his death by positive evidence. With every respect for their Lordships I feel constrained to say that the proposition is simply absurd from a practical point of view. Disappearance of the person and non-receipt of any intelligence about him and the consequent impossibility to obtain a clue about his life or death give rise to the presumption of his death after a particular period according to the English and Hindu Law principles etc ; the very S. 108 owes its existence to the impossibility of giving evidence concerning his life or death. When their Lordships call upon the person who invites a presumption to prove it by evidence, they are simply begging the question. What an anomaly is created by those rulings may be shown by an illustration as under :

A disappears in 1890 A. D. and is never heard of for ten years by persons who would in ordinary course hear of him if alive. In the year 1900 A. D. his wife or (rather widow) sells the property to B: The latter sues for possession in the year 1904 A. D. In the absence of the proof (which is impossible) that the person was dead at the time when the conveyance was passed the claim of B would be rejected under the rulings above referred to. Then what is the legal situation of the assests of the person disappearing ? How can it be dealt with by the persons left behind ? In the particular case the wife can never alienate the property in her own name, because no presumption of death is allowed at a particular date ; while the person disappearing is not supposed to re-appear. At the same time no outsider would undertake the precarious position of proving the death by evidence. Taking the situation to its logical conclusion in all its bearings it comes to an impasse.

It might be replied that this confusion can be avoided by the widow applying for a succession certificate to the assests of her husband seven years after his disappearance. I doubt whether she can obtain the certificate, and, if she succeeds, whether it can protect the purchaser of immovable property. But assuming that she can obtain the ceritficate and that it is an ample protection to the person who dealt with her why should there be a necessity of going to a court of law, which can be avoided, if the necessary presumption is raised.

Their Lordships in arriving at the conclusion have relied upon the phraseology of S 108, and they are quite correct in so far as that is concerned. But with due deference, it is submitted that the Evidence Act is not exhaustive and that it is an adjective law, while the question falls within the orbit of the substative law : for consequent upon the presumption of death there crop up new civil rights and obligations in lieu of the old orders. (Held contrary in 1 *All.* 53 (*F. B.*) followed in 11 *Bom.* 433.) We

had the Hindu Law and there is the English Law that after a particular period the man is to be presumed to be dead, thus giving rise to new rights and liabilities. This part of the substantive law is discountenanced by the said rulings though not in so many words and no compensating principle has been substituted. True the cases reported in 8 *I. C.* 55 (*All.*) and 37 *Mad.* 40; 33 *Cal.* 173 and 41 *M. L. J.* 215 have followed the English principle that after seven years the man is to be presumed to be dead and they have put this construction upon S. 108, Evi. Act 8 *I. C.* 55 (*All*) is a very elaborate judgment reviewing all the previous authorities. In my humble opinion this section does not admit of that interpretation. But upon the general law the principle would be quite sound.

But as the recent tendancy of all the High Courts is to interpret the section so as to apply it comprehensively, this protest is necessitated. The difficulty is noticed in 37 *Cal.* 103.

It is therefore, submitted that the anomaly may be set right either by the Legislature or by the High Courts.

Reviews of Books

The Indian Succession Act (Act XXXIX of 1925): By A. C. Ghose, M.A. B.L., Vakil, High Court, Calcutta. Published by M. C. Sirkar & Sons, Calcutta, 1926, pp. 687.

Mr. A. C. Ghose is not new to the legal profession and to law students. We are already aware of the immense popularity which his book on the Provincial Insolvency Act commands. The commentaries on the Indian Succession Act now before us are written on the same lines as the author's well-known work on the Insolvency Law in India. We venture to think the present book will soon command the same popularity and will soon run into many editions. The Indian Succession Act is a very important piece of legislation consolidating together a great many Acts of the utmost importance. Until recently, there was a paucity of good commentaries on the Indian law of succession and cognate subjects. The author has achieved unique success in giving us a book which is very complete and at the same time very terse and lucid. The Indian law relating to testamentary succession is practically evolved out of the principles of English jurisprudence. The author has rightly drawn very freely on the English case law to elucidate the provisions of the Indian statute. To each section is appended within brackets the corresponding reference of the repealed statute. In cases where a section is enacted for the first time, the author has taken the trouble to trace it often to corresponding English statutes or to corresponding passages in the leading English text books. Busy practitioners will find these references to analogous English law very helpful in interpreting the Indian statute which is by no means easy even to one who is very familiar with the intricacies of the law of succession. On the subject of Wills and Codicils the arrangement of the Indian statute helps the author in giving in a clear and well arranged form the entire law relating to Wills. The references to the Indian case law are appropriate and exhaustive. The printing and get up of the book are excellent. 687 pages of solid and valuable matter, attractively cloth bound and given at the price of Rs. 6, is a marvel in the line of law publication and we have the greatest pleasure in congratulating the publishers on this achievement.

The Law of Pleadings in British India: By P. C. Mogha, with an introduction by the Honourable Sir Grimwood Mears, Kt., Chief Justice, Allahabad. Published by the Eastern Law House, Calcutta, 1926, Royal Octovo, pp. 476.

The Civil Justice Committee pointed out in their report the absence of any suitable Indian Text-book written on the lines of Bullen and Leake's 'Principles and Precedents." The other English book, viz., Odgers on the Law of Pleadings, which supplements Bullen and Leake though not expressly referred to in the report of the Civil Justice Committee must have been present to the minds of the members of the Committee. The Civil Procedure Code enacts the principles of pleadings very fully in the body

of the Code and a large number of useful precedents are given in the schedules attached to the Code. The complaint that Indian practitioners have not been giving sufficient attention to these rules and precedents is to a large extent justified. Mr. Mogha's book written practically on the suggession contained in the report of the Civil Justice Committee will be found useful in specially bringing to the notice of practitioners these principles and precedents. The first part of the book before us deals with the principles of pleading. The errors ordinarily found in Indian pleadings are clearly pointed out. This part is a clear and useful analysis of the Code so far as the law of pleadings is concerned. One cannot expect a commentary on the chapters of the Civil Procedure Code in an exposition of this kind. The author has done well in clearly stating the principles making reference only to strikingly useful English and Indian cases. The second part of this book contains precedents which are no doubt given on the lines of Bullen and Leake. The value of a precedent lies in pointing out why the precedent ought to be so with reference to decided cases. As is so often said, he knows not the law who knows not the reason thereof. This statement is most justified in the case of precedents. The author has suceeeded in making the precedents very attractive and useful. The precedents with reference to plaints in suits under the Hindu Law, are typical and illustrative so far as they go, and in the nature of the subject an exhaustive treatment is not always easy. The precedents in the matter of written statements and miscellaneous applications will be found very useful. The book is printed on featherweight paper and is excellently got up.

Jottings

Magistrates and Polities.

Lord Haldane in his address to the Magistrates' Association, no less than Lord Cave, in his letter to the Times at the beginning of the month, made it clear to the meanest intellect that the motive of a Lord Chancellor in desiring to be informed as to the politics of a person recommended for appointment to the Bench was to enable him to act on the principle laid down by the Royal Commission of fourteen years ago. Naturally, the personal fitness of an individual is the first consideration for appointment but, as the commission rightly pointed out, "it was not in the public interest that there should be an undue preponderence of justices drawn from one political party." The information is required, not for exclusion, but for inclusion, and the suggestion that appointments are made "solely on political grounds" is known to be absolutely without foundation.

The Law Times—Volume 160, *p.* 313.

Teaching of Law

Following the precedent of Lord Justice Atkin in his address on "The Place of Law in University Education," delivered just two years ago, Professor de Montmorency, in his introductory lecture on "Law and the Faculty of Arts," at University College. London, put forward a strong plea for teaching law in schools as part of the regular curriculam. To make the broad principles of law a normal and compulsory subject of instruction and examination would be productive of much good, inculcating a respect for law and order and bringing home to the young a general knowledge of the system and method of government under which they live Not only schools but also the universities might well make the subject a necessary one, for merely as mental instruction and intellectual discipline a study of the law is invaluable. No one desires to turn laymen into lawyers, to use the words of the learned Lord Justice, but merely that the layman should learn the elemen ts of law."

The Law Times Volume ; 163 *page* 268.

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PRECEDENTS

On questions of fact or matters of discretion there can be no precedent. Each Judge is entitled to come to the conclusion he thinks right on questions of fact and in matters of discretion. *A. I. R.* 1926 *Rangoon* 109 *at* 110.

LAW REPORTING RULES.

Mad. L. Journal (*Vol.* 8, *page* 456) (1898).

Edited by V. Krishnaswamy Aiyar and P. R. Sundara Aiyar, afterwards High Court Judges, Madras ; and Hon. P. S. Sivaswamy Aiyar, ex-Executive Councillor, M. L. A.

A case should never be reported on account of the obiter dicta of the Judges ; they often cause serious difficulty when the question they deal with comes up for actual decision, and frequently have to be explained away or put on the side altogether. Take, for instance, the case of *Amrito Lall Dutt* v. *Surnomayi Dasi* (25 *Cal.* 662) which occupies over thirty pages of the Reports. The appellate Court held, on the construction of a will, that a power to adopt had been given to the widow jointly with other persons, and there does not appear to have been any argument that such a power was valid. The case was decided on this point by two of the Judges, who expressly declined to go into another question, as to the validity of a direction to accumulate income ; the judgments of the third Judge in the appellate Court, and of the Judge in the Court below, on the latter point, were therefore mere *obiter dicta*, and the case is only an authority upon the construction of a particular will, and should, I think, have been omitted altogether. *To report obiter dicta is to give to the Reports the functions of legal treatises, which was not apparently the intention of the founders of the Indian Law Reports.* * * *

Articles

INSTALMENT BONDS AND THE LAW OF LIMITATION

We often come across bonds providing for payment of the debt secured by the bond by instalments with a provision that in default of payment of one or more instalments the whole debt shall become immediately payable irrespective of the provision for instalment payments. The question of the starting-point of limitation in such cases has given rise to much difficulty and some conflict of opinion. Art. 75 of the Limitation Act provides that for a suit "On a promissory note or bond payable by instalments, which provides that, if default be made in payment of one or more instalments, the whole debt shall be due", the period of limitation is three years. Column 3 prescribes as the starting-point the time when the default is made unless where the payee or the obligee waives the benefit of the provision and then when fresh default is made in respect of which there is no such waiver. Many cases have applied the principle of Art 75 to cases arising under Art 132 which relates to suits to enforce payment of money charged upon immovable property, the starting-point for which class of suits is the time when the money sued for becomes due. Another analogous question is often raised in connexion with Art. 182, Cl. 7 (of the 3rd column) in respect of decrees directing payment of the decree debt in instalments with the defeasance clause which makes the whole debt exigible on the occurrence of a default. We propose to discuss the principle underlying the case law under Art. 75 and Art. 132 leaving the cases under Art. 182, Cl. 7 to be discussed on another occasion.

The English Law is laid down in the leading case of *Hemp* v. *Garland* (1). The decision in *Hemp* v. *Garland* (1) was followed by the Court of Appeal in *Reeves* v. *Butcher* (2). In 19 Halsbury at page 44 the English Law on the subject is stated thus: "If in an agreement for the repayment of an existing debt by instalments, it is provided that on default of payment of any instalment the whole debt shall be recoverable, the statute runs as to the whole debt from the time of the first default in payment of an instalment."

Hemp v. *Garland* (1) is a typical case. There the defendant owed to the plaintiff a sum of £330. He executed a document undertaking the payment of the debt with interest by certain instalments and that in case default should be made in the payment of any of the instalments, the plaintiff should be at liberty to enter a judgment and take out execution for so much of the principal debt of £330 as should remain unpaid as if all the periods for the payment had expired. None of the instalments were paid. Three of the instalments were due within six years before the date of suit and some were due more than six years before that date. The defendant pleaded that the whole suit was time-barred and that the claim even in respect of the three instalments which under the English Law were within the period of limitation was time-barred as under the bond the whole debt became due at a time prior to six years before the date of the said suit. Lord Denman, C. J., upheld the defendant's contention and dismissed the suit in toto. The learned Judge observed: "In this case there was a default more than six years ago; and upon that the plaintiff might, if he pleased, have signed judgment and sued execution for all that remained due, or he might have maintained his action. If he chose to wait till all the instalments became due, no doubt he might do so; but that which was optional on the part of the plaintiff would not affect the right of the defendant who might well consider the action as accruing from the time that the plaintiff had a right to maintain it. The statute of limitation runs from the time the plaintiff might have brought his action, unless he was subjected to any of the disabilities specified in the statute; and, as the plaintiff might have brought his action upon the first default, if he did not choose to enter up judgment, we think that the defendant is entitled to the verdict upon the plea of the Statute of Limitation." This lucid statement of

(1) [1843] 40 B. 519=3 G & D 402=7 Jur. 302=12 L. J. Q. B. 134.
(2) [1891] 2 Q. B. 509=60 L. J. Q. B. 619=39 W. R. 626=65 L. T. 329.

the law has been accepted and followed without demur in the later English cases.

It may be noted that the English case law makes no distinction between the plaintiff having an option to sue for the entire debt on the happening of the first default and his being under an obligation to sue for the entire debt on the happening of the first default. For the first time the Allahabad High Court raised this distinction in a case arising under Art. 182, Cl. 7. In *Shankar Prasad* v. *Jalpa Prasad* (3), their Lordships made the starting-point of limitation depend upon the construction of the decree in question. They said : " In the present case it appears to us that the intention was that the decree-holder on the happening of any default might, if he wished, execute the decree for all the decretal money then unpaid, but that it was not the intention that on the happening of a default the decree-holder should be bound to execute the decree once and for all. We consequently hold that the application for execution was not barred by limitation as default had been made in the payment of an instalment within three years of the date of the application". The next Allahabad case, *Maharajah of Benares* v. *Nand Ram* (4) dealt with the language employed in Art. 75. This case however did not maintain the distinction between the duty to sue and the option to sue. In the bond in that case there was a provision enabling the creditor on failure on the part of the defendants to pay any instalments on the appointed date, to sue for and recover the entire amount of instalments then remaining unpaid. Their Lordships were clear that this was only an option to sue that was given to him. They however held that the case came under Art. 75 and that the starting-point of limitation was no doubt from the time when the first default was made. But on the facts of that particular case they said that there was an implied waiver which shifted to a later date the starting-point of limitation. In *Jadab Chandra Bakshi* v. *Bhairab Chandra Chuckerbutty* (5) the Calcutta High Court laid down in unambiguous terms that the statute begins to run from the time when the plaintiff had his right to sue unless it is proved that he waived the right to demand the whole on default being made in the payment of one of the instalments and agreed, notwithstanding the default, to accept subsequently the instalments payable under the bond. They referred with approval to *Hurri Pershad Chowdry* v. *Nasib Singh* (6) and stated " no distinction can be drawn between the case in which it is provided that, on non-payment of an instalment the whole shall become due, and one in which it is provided that on non-payment of an instalment the whole amount may be sued for." Their Lordships held that the real question is what is the date on which the plaintiff's right to bring his action arose. This view of the Calcutta High Court was expressly dissented from by the Allahahad High Court in *Ajudhia* v. *Kunja* (7). The Allahabad High Court again put forward the distinction between the duty to sue and the option to sue. They said : " It is conceivable that the bond might be so worded as to compel a creditor to sue for the whole amount immediately if any default occurred. The bond with which we have to deal is not so worded. It merely gives the creditor an option." There is no warrant in the language of Art. 75 for this nice distinction.

The words simply are : " On a pomissory note or bond payable by instalments, which provides that, if default be made in payment of one or more instalments, the whole shall be due." The test is whether the whole is due and not whether the plaintiff is under a duty to sue for the whole or has simply an option to sue for the whole. In other words the starting-point of limitation is rightly not made to depend upon the volition of the plaintiff alone without anything done by the defendant. When once default occurs and plaintiff's cause of action to sue for the whole arises limitation begins to run, and anything that the plaintiff may do or omit to do will not affect the starting-point of limitation. The third column however provides an exception under which by something done by both the defendant and

(3) [1894] 16 All. 371=(1894) A. W. N. 115.
(4) [1907] 29 All. 431=4 A. L. J. 336=(1907) A. W. N. 139.
(5) [1904] 31 Cal. 297.
(6) [1894] 21 Cal. 542.
(7) [1908] 30 All. 123=5 A. L. J. 72=(1908) A. W. N. 36.

the plaintiff there can be a waiver of the default and the starting-point of limitation is postponed to the happening of a default subsequent to such waiver. The difficulty created by the words employed in Art. 75 and the reasoning we have just adverted to was considered by the Allahabad High Court in *Amolak Chand* v. *Baijnath* (8). The distinction between the option to sue and the duty to sue was not raised and Art. 75 was held to apply and the decision in *Ajudhia* v. *Kunja* (7) was distinguished on the facts of that case.

In this state of the law, in view of the conflicting opinion between the Calcutta High Court and the Allahabad High Court and in view of the conflict between the several decisions of the Allahabad High Court subsequent to 16 *Allahabad* the question naturally came up before a Full Bench of the Allahabad High Court in *Gayadin* v. *Jhumman Lal* (9). This was unfortunately a case under Art. 132 of the Limitation Act but that does not make much difference. Art. 75 says 'the whole shall be due' and Art. 132 says 'when the money sued for becomes due.' We are unable to see any difference between the 'money being due' and 'the money becoming due' as far as this question is concerned. Sir Henry Richards, C. J., and Tudball, J., accepted the stricter view and held that there is no warrant in the law for any distinction being drawn between cases of an option to sue and cases of a duty to sue and they also held that in all cases whether the option to sue was exercised or not limitation began to run in respect of all the instalments from the date of the first default unless there is a waiver as contemplated by the law. Bannerjee, J., however dissented from the other two learned Judges. The learned, C. J., dealt with this argument in the following words:—It is contended on behalf of the appellant that the mortgagees were entitled to sue, and that accordingly on a true construction of the mortgage deed the money did not 'become due' until the expiration of ten years from the date of the mortgage. I cannot agree with this contention. It seems to me that money is 'due' when it can be legally demanded and it is admitted in this present case that the money secured by this mortgage, could have been legally demanded and recovered after the first default, and had a suit been brought for its recovery by sale of the mortgaged property, the defendants could not have pleaded that such a step was premature. For this there is the high authority of the English Court of Appeal in the case of *Reeves* v. *Butcher*" (2). The learned Chief Justice fortified his statement of the law with copious extracts from the learned judgments in *Reeves* v. *Butcher*" (2). We are however unable to follow the reasoning of the learned Chief Justice in this case when he seeks to distinguish the decisions of the Allahabad High Court in 29 *All.* 431, 16 *All.* 371 and 30 *All.* 123 on the ground that those cases were under Art. 75 and the case which he was dealing with arose under Art. 132. This attempt to distinguish, though it may not carry conviction, does not however detract from the reasoning of the learned Judge on the question of the starting-point of the limitation. The argument which did not find favour with the majority of the Full Bench is stated lucidly by Bannerji, J. the dissenting judge. His Lordship said:

> Whether, under the terms of the document, the creditor is authorized to wait for the full period stipulated for repayment, the money cannot be held to have become due, within the meaning of Article 132, until the expiry of the period. The first clause, as to payment of the whole amount on the occurrence of a default, was clearly inserted in the document for the benefit of the creditor and as he was expressly authorized not to take advantage of the clause, I am unable to hold that he was bound to sue when default was made. Any other view would, as observed in *Maharajah of Benares* v. *Nand Rair* (4) be very unfortunate. It would be to punish a creditor for forbearance shown to his debtor, and compel him to press his demands at the earliest opportunity and insist upon speedy and full satisfaction of his claim. The question in that case was of the applicability of Art. 75 which of course does not govern this case but the principle of the ruling applies.

It is the policy of the Statute of Limitation to punish undue forbearance, if a creditor sleeps over his rights to recover money due to him on a pronote for more than three years he cannot complain that the Statute of Limitation has barred his remedy. So too where the creditor elects to have a mode of bringing pressure upon the debtor by having a defeasance clause, he must abide by the consequence of the law prescribing as the starting-point of limitation the happening of the first default. To plead that a

(8) [1914] 35 All. 455=20 I.C. 933=11 A.L.J. 664.
(9) [1915] 37 All. 400=28 I.C. 910=13 A. L. J. 510 (F. B.)

certain volition of an individual plaintiff as evidenced at the time of the suit, should affect the starting-point of limitation prescribed by the law at a time anterior to the institution of the suit sounds to be somewhat of a special pleading.

Even after this authoritative pronouncement of the Full Bench of the Allahabad High Court an attempt was made to upset the majority ruling in *Nathi* v. *Tursi* (10). If we may say so with respect the point is discussed in clinching language in the judgment of Walsh, J. His Lordship says :

> It is impossible to hold, whether you call it an option or not, that a creditor has a right to sue and yet that the money is not due. It is merely a question of contract. The borrower has agreed that the creditor shall have the right to sue for the whole of the principal and interest become due. Turning to Art. 132 of the Limitation Act, which is the only provision which applies, it is provided that the Statute shall run from the date when the money becomes due.

The Statute, therefore, must run from the date of the first default. The liability to pay, or in other words, the test whether money becomes due or not, is the obligation which the borrower has taken upon himself by his signature to the written document. It cannot depend upon the volition of the creditor. The volition of the creditor merely decides the remedy which he chooses to seek. In this case, the money became due when default was made and the decision of the Court below was right. We are unable to follow *Mata Thahal* v. *Bhagavan Singh* (11). No mortgagee or creditor is 'bound to sue'. If we may say so with respect, the point cannot be put in happier language. The decisions of the Allahabad High Court in 37 *Allahabad* 400 and 43 *All.* 596 were again followed in *The Collector of Jaunpur* v. *Jiwa Prasad* (12). We may take it that as far as the Allahabad High Court is concerned the point is now settled. And as the Allahabad view is consistent with English authority and logical reasoning on the language of the statute we venture to think that so long as the language of the statute remains as it is it is not likely that the Allahabad High Court will upset the decision of its Full Bench in 37 All. 400.

(10) [1921] 43 All. 671=63 I.C. 886=19 A. L. J. 712.
(11) [1921] 19 A.L.J. 406=63 I.C. 477.
(12) A.I.R. 1922 All. 37.

The view of the Calcutta High Court is also practically the same as the view taken by the Allahabad High Court. The decision in *Sitab Chand Nahar* v. *Hyder Malla* (13) which decided that the period of limitation for the entire debt ran from the date of the first default has been consistently followed by the Calcutta High Court : *Jadab Chandra Bakshi* v. *Bhairab Chandra Chukker Butty* (5), and *Bholanand Jha* v. *Padmanund Singh* (14), and *Girindra Mohun Roy Choudhry* v. *Bocha Das* (15), are later decisions of the Calcutta High Court where the view taken by the Allahabad High Court has been consistently taken.

The question came up before the Madras High Court practically for the first time in *Perumal Ayyan* v. *Alagirisami Bhagavathar* (16). In this case after the usual terms the defeasance clause provided as follows : "If there be default in making payments as aforesaid.....I shall pay in full the principal with interest at 1-1/2 per cent on demand by the holder out of my said hypothecated properties and other properties." It was practically conceded that the starting point of limitation for the entire debt was the happening of the first default. An ingenious attempt was made to get over the difficulty of limitation by suggesting that the words "on demand" must be given their literal meaning and that the entire debt became due only after the creditor made his demand. The learned Judges however held that the words "on demand" must be regarded as a technical expression equivalent to "immediately" or "forthwith." They held that no actual demand was necessary to complete the plaintiff's cause of action and that therefore the entire debt was time barred, calculating the period from the date of the first default.

The attempt to get over limitation by giving a meaning to the words "on demand" or "whenever you require" was however persisted in. In *Vythilinga Nadan* v. *Narayanasami Ayyan* (17), the attempt was successful. In *Nettakaruppa Goundan* v. *Kumarasami*

(13) [1897] 24 Cal. 281=1 C. W. N. 229.
(14) [1901] 6 C. W. N. 348.
(15) [1909] 36 Cal. 394 = 13 C. W. N. 1004 = 1 I. C. 49=9 C. L. J. 226.
(16) [1897] 20 Mad. 245=7 M. L. J. 222.
(17) [1906] 16 M. L. J. 364.

Goundan (18) the success was even more pronounced as in this case the decision in *Perumal Ayyan* v. *Alagiriswami* (16) was expressly dissented from. As this was felt to be a rather crude way of getting over the difficulty of limitation Abdul Rahim, J., in *Karunakara Nair* v. *Krishna Menon* (19), tried to bring the case within the statute under the heading of Waiver. He held that the omission to make the demand amounted to a waiver under Art. 75 and that limitation began to run from the date of the next fresh default. The soundness of this view is very doubtful, especially in view of a long course of decisions to the effect that even acceptance of overdue instalments will not constitute a waiver and that something more overt is necessary. The acute criticism of Lord Denman C. J., that the question of limitation cannot depend solely on the volition of the plaintiff applies with great force to the attempt made by Abdul Rahim, J., to put on a logical basis what apparently is far from being logical. Seshagiri Ayyar, J., in *Sitaram Ayyar* v. *Munisami Mudaliar* (20) pointed out that except in the cases arising under the Negotiable Instruments Act the words "on demand" must be given their literal meaning and that where the whole amount is payable only on demand after the occurence of the first default, limitation does not begin to run unless a demand is made for payment of the entire debt.

But in the case of instalment bonds where the words "on demand" or the words "when you require" are not present, the difficulty still remains whether time begins to run from the date of the first default or not. An instance of this kind is found in *Narana* v. *Ammani Amma* (21). This was a case under Art. 132. The learned Judges who were confronted with *Reeves* v. *Butcher* (2); *Hemp* v. *Garland* (1) and the long line of cases of the Allahabad High Court distinguished these cases on the ground that the case before them was under Art. 132 and not under Art. 75. We venture to think that as far as this point is concerned this is a distinction without a difference. How this makes any difference is not pointed out and beyond an obiter dictum we find no reasoning in support of this distinction. They expressly dissented from the majority view of the Allahabad Full Bench in 37 *All.* 400, and adopted the minority view of Bannerjee, J., in the same case which we have already criticized. The high authority of Lord Denman, C. J., was however respected. While the judgment conceded that in all probability the language of Art. 75 was borrowed from Lord Denman's judgment, the learned Judges proceeded to say that the case before them was not under Art. 75, but under Art. 132. In the next case before the Madras High Court *Nicholson Bank, Tanjore* v. *Rajagopala Ayyar* (22), the first default arose directly under Art. 75 and without the back door of the words "on demand" through which the plaintiff could escape. It is somewhat curious that the learned counsel that argued this case did not refer to any Allahabad case and referred only to *Reeves* v. *Butcher*, *Hemp* v. *Garland* and some Calcutta cases. The judgment followed *Hemp* v. *Garland* and *Reeves* v. *Butcher* and held that "the distinction sought to be drawn between cases where the document provides that the whole amount shall become due and cases where it only gives an option to the creditor" is not supported by the later authorities. It was held that limitation began to run from the date of the first default and the plaintiff was given relief on the ground of waiver under Art. 75.

In *Ranadh Bibi Ammal* v. *Kandasami Pillai* (23), the Madras High Court followed its own decision in 39 *Mad.* 981 and expressly dissented from the judgment of the Calcutta High Court in 24 *Cal.* 281. One justification for this view is that in the document in 9 *L. W.* 479 the whole debt became due whenever the plaintiff required it after the first default. Instead of deciding the case on this narrow ground which will be consistent with the prior Madras decisions, the learned Judges went further and held that where the plaintiff is given only an option to sue limitation does not run from the date of the first default.

(18) [1899] 22 Mad. 20=8 M. L. J. 167.
(19) [1913] 36 Mad. 66=12 I. C. 57.
(20) [1919] 37 M. L. J. 613=50 I.C. 87=9 L. W. 427=(1919) M.W.N. 185.
(21) [1916] 39 Mad. 981=4 L. W. 77=35 I. C. 418=31 M. L.J. 865=(1916) 2 M.W.N. 125.
(22) [1917] 5 L. W. 514.
(23) [1919] M.W.N. 82=51 I.C. 724=9 L.W. 479.

Krishnan, J., said :

that clearly gives an option to the mortgagee to anticipate the due date and call in his whole money if he so chooses, but he is not bound to do so.

In a case where the language of the instrument will support the view that he is bound to sue, does limitation begin to run from the date of the first default ? When the occasion comes we are afraid some new reasoning will be adopted to give an aaswer again in plaintiff's favour. In *Mohideen Karya Pulavar* v. *Periyanayakan Pillai* (24) the verge of the extreme limit is reached. Krishnan, J., said

it is conceded that the view taken in this High Court is that where there is an option open to a person to call up the whole debt, or not, as he chooses, if he does not exercise that option it will not be held against him that his cause of action has arisen on the default itself.

In a case where a demand is made on the happening of the first default and a suit is not filed within the 'period of limitation calculated from the date of the first default, can it be said that the failure to sue, though a demand was made, cannot deprive the plaintiff of the longer period of limitation which otherwise he would have had ? The Madras High Court is likely to answer even this question in the plaintiff's favour.

The decision in *Narana* v. *Ammani Ammal* (21) was expressly followed in *Lachakka Ammal* v. *Sokkayya Naick* (25) and in *Kaliappa Nadar* v. *Sami Iyer* (26) and again in *Appayya* v. *Venkataramayya* (27). When the matter again came up before a Bench of the Madras High Court in *P. M. A. Muthiah Chettiar* v. *Venkatasubbarayalu Naidu* (28), the learned judges without any discussion felt that they were bound to follow the line of cases in the Madras High Court in preference to the equally long line of cases in the Allahabad High Court.

We have said enough to show that the Madras view is not consistent with English Law and is not quite logical. There ought to be a limit to the straining of the language of a Statute to defeat the plea of limitation. We hope that the Madras view will be brought into line with the views of the Allahabad and Calcutta High Courts by a Full Bench decision or a Privy Council decision.

(24) A. I. R. 1925 Mad. 233.

(25) [1918] M. W. N. 586=48 I. C. 191.
(26) [1921] M. W. N. 384=62 I. C. 762.
(27) A. I. R. 1925 Mad 150.
(28) A. I. R. 1926 Mad. 160.

Reviews of Books

The Code of Civil Procedure : By Dr. Nand Lal, B. A., LL. B. (Cantab) LL. B., Bar-at-law, pp. royal octavo over 3,400, (in three vols.) : Price Rs. 30.

This encyclopaedic work of over 3,400 pp. contains Letters Patent for all the High Courts in India ; rules framed under S. 122, Civil Procedure Code, by all the High Courts ; the High Courts Act, 1861, the Government of India Act ; and is certainly much more exhaustive than the most exhaustive Code of Civil Procedure by M. C. Sarkar. Dr. Nand Lal refers in the preface to two schools of authors one of which comprises "writers (commentators) who choose to remain contented with the authorities, reported, in the main, in the official and in the authorized reports only." Happily, however, this school is slowly merging itself in the other school of writers who recognise "non-official journals." Dr. Nand Lal belongs to the second school and the readers of the "All India Reporter" will therefore find complete references to the "All India Reporter" as well as to all the important non-official journals and periodicals.

The reasons for the changes in the different Codes of Civil Procedure are given as they are stated in the statement of "objects and reasons" or the report of the Select Committee or the proceedings of the Legislative Council wherever they are so mentioned ; but in other cases other sources, including decisions of the Courts, are availed of for explaining away the changes. Extraordinary pains have been taken by the learned author to bring the case law down to the end of 1925, and hence an addenda of 400 pp. had to be given which will thus complete the case law to the end of 1925. The author has attempted

to collect very assiduously the whole case law and has tried to analyse carefully and judiciously all the rulings under appropriate headings, and one remarkable feature of the work under review is that relevant English and American cases, having a material bearing, have been pressed into service. We hope that the aim of the author to serve the busy practitioner and also to elucidate the principles of the law will be surely accomplished.

The printing of the well known Commercial Press, Triplicane, Madras, and the general get-up are all that can be desired. The price of Rs. 35 towards first sight appears to be heavy, but is probably justified by the amount of matter compressed in the closely printed pages which exceed 3,400 excluding the index.

Trial of Abraham Thornton :

Edited by Sir John Hall, Bt., Published by Messrs. Butterworth & Co. Ltd., Calcutta. Price Rs. 6-8-0 : Demy pp. 183.

This is the 37th book in the series of the Notable British Trials of which the general editor is Mr. Harry Hodge. The introduction which extends over 60 pp. gives a complete history of the trial as well as a complete description of men and places connected with this trial and is very instructive and interesting. This along with copious illustrations and appendices provide a complete report of this famous trial. The publishers expect that the series will be indispensable to the lawyer as giving examples of bygone practice or as affording precedents for the present guidance

Jottings

Woman's Status.

"When, in his delightful comedy, "She Stoops to Conquer," Goldsmith makes Tony Lumpkin, while misdirecting Marlow and Hastings to Mr. Hardcastle's house as an inn, maliciously describe its owner as a rich landlord who, wishing to be taken for a gentleman, will persuade them that "his mother was an alderman and his aunt a justice of the peace, the dramatist was putting what he and his comtemporaries considered to be the acme of nonsense. In this matter, however, as in not a few others, the whirligig of time has brought in its revenges, that was uttered in jests as an impossible state of things, having, as we all know, been literally realized. We have become familarised with the fact of women taking an active part in public life in Parliament, in municipal affairs, at the Bar, and in various other spheres which, not so many years ago, were completely closed to them. Now, in the United States, a further invasion of what has been accounted man's province—the consular service—has taken place, a lady graduate of the American Foreign Service School, having been appointed Consul at Amsterdam, the first woman to receive such a post. Many of the varied duties which fall to be discharged by consuls may as fittingly be discharged by a woman as by a man; for example, in receiving the protests of captains of vessels with reference to injuries sustained at sea; in administering the property of subjects of their state dying in the country where they reside, and in collecting information upon commercial, economical and political matters likely to be of value to the State he or she represents. We have some doubt, however, whether in certain other matters a woman would possess the same qualifications as a man. For example, Hall, in his treatise on International Law, mentions that among the other functions which consuls are called upon to discharge fs the exercise of disciplinary jurisdiction over the crews of vessels of the States in the employment of which they are. Here, we are afraid, a woman consul might be at a serious disadvantage in dealing with an unruly set of seamen, Perhaps, however, even this difficulty will be successfully overcome, and, at all events, the experiment of appointing a woman consul will be watched with interest."

The Law Times Volume 180 *p.* 121.

THE

ALL INDIA REPORTER

1926] (JOURNAL SECTION) [August

NOTES AND COMMENTS

PRECEDENTS

A. I. R. 1925 *Privy Council* 272 *at* 279=1 *Pat* 741.

It is not open to the Courts in India to question any principle enunciated by the Privy Council, although they have a right of examining the facts of any case before them to see whether and how far the principle on which stress is laid applies to the facts of the particular case. Nor is it open to them, whether on account of "judicial dignity" or otherwise, to question its decision on any particular issue of fact.

LAW REPORTING RULES

Mad. L. Journal (*Vol.* 8, *page* 456) (1898)

Edited by V. Krishnaswamy Aiyar and P. R. Sundara Aiyar, afterwards High Court Judges, Madras ; and Hon. P. S. Sivaswamy Aiyar, ex-Executive Councillor, M. L. A.

In the Indian, as in the English, Law Reports, the favourite form (of head note) is a resume of the facts followed by a short statement of the decision of the Court thereon. This form of head-note is often prepared by taking from the judgment, almost *verbatim et literatim* those portions which set out the general facts of the case, and the findings of the Court : *See* (20 *All.* 237 ; 22 *Bom.* 899). This practice virtually amounts to throwing the burthen of deducing the *ratio decidendi* upon the reader. *Moreover, the facts are usually stated with a particularity and detail which distract the reader's attention from the essential elements of the case* : *See* (25 *Cal.* 306). In the case cited the material facts were that a mortgagee paid money in order to avoid a sale of the mortgaged property under a superior title, during the pendency of litigation between the mortgagee and the mortgagor, in which the question was whether the mortgagee had, in fact, any subsisting interest in the property, and in which it was subsequently determined that he had no such interest. The decision of the Court was that an interest contingent upon the uncertain mortgagee's favour, was sufficient to sustain a suit by him for repayment of the money by the mortgagor. But the reporter informs us in his head-note of the nature of the mortgaged property, the amount of the mortgage-moneys, and the various stages, with the exact dates of the litigation in the High Court and the lower Court, between the mortgagee and the mortgagor.

The Judicial Committee.

The legislation in the House of Lords that was recently passed relating to the appointment of two members of the Judicial Committee having Indian experience is noteworthy from the Indian point of view. The paltry allowance of £ 400 per annum on which distinguished Indian Judges were expected to work in London was, as is well known, absolutely unattractive. The present increase to £ 2,000 per annum must really attract Indian lawyers in the front rank still in active and vigorous practice. Even vakils who have practised in any of the High Courts for the prescribed period are eligible for appointment as members of the Judicial Committee. It may be noted in passing that as the Government of India Act now stands Vakils of an Indian High Court, however eminent they may be, cannot be appointed as permanent Chief Justices of the Indian High Courts. In view of this we must regard it as a distinct advance in the status of the Vakil that he is eligible to be appointed as a member of the Judicial Committee, if he has the requisite standing at the bar. It is sad to learn that the Rt. Honourable Mr. Amir Ali, the only Indian member of the Judicial Committee is not now in very good health.

The words "Indian experience" are apt to be interpreted to mean European barristers who have had Indian experience as High Court Judges.

We hope that any such narrow interpretation will be avoided and as far as possible the Indian element on the Judicial Committee will be strengthened by the appointment of Indians whether Indian vakils or Indian Judges with an eye purely to their attainments and eminence without any extraneous considerations, political or communal.

The Punjab Money Lender's Bill.

After a somewhat excited and stormy session the Punjab Money Lender's Bill was passed into law with various substantial amendments by way of modification, the main modification being even a change in the name of the Bill. The Bill is christened at the instance of the Government as the "Regulation of Accounts Bill." It is most unfortunate that this beneficent piece of legislation was made the target of attack on communal lines. There has been plenty of legislation to control and regulate the activities of money lenders in England and the continental countries. The position of an up-country money lender educated, rich and influential is somewhat unique. He has at his mercy the ignorant, needy agriculturist with no influence whatever.

Where two parties so dissimilarly conditioned come together, it is somewhat ludicrous to talk of the freedom of contract as if the contract is completed with a free and knowing will without any unfairness or undue influence. Knowing as we do how in some provinces even accounts of Municipalities and Local Bodies are most irregularly and inefficiently kept, we find no great departure from what is right or reasonable in requiring that professional money lenders should keep their accounts in a particular manner and should give to their constituents certain facilities which would help them against any imposition or fraud. We must congratulate the Punjab Legislative Council on the passing into law of a measure which will ultimately be found to promote harmony and agricultural prosperity. We are unable to deal with the further details of the Bill without the proceedings of the legistature before us. We hope to advert to this piece of legislation in a later issue when we shall examine in greater detail the provisions thereof and find out what might possibly have led to the communal opposition that was raised.

Articles

CRITICISM OF THE NEW LEGAL PRACTITIONERS ACT.

By D. W. Kathalay, B.A., LL.M.,

Advocate, Nagpur, Central Provinces.

The recent legislation passed by the Assembly in the matter of legal practitioners has been the subject of comment not only in Nagpur but also in other places. A few days ago Barristers of the Lahore High Court protested against the clauses making the Barristers liable to be sued for negligence and requiring them to file a written and stamped authority from their clients, and Mr. O'Connor took the view that as Barristers owed allegiance to their Inns of Court only, submission on their part to the new legislation would amount to professional misconduct. It is to be noted that no protest is made against that section of the new Legal Practitioners Act, which gives a right to the Barristers to sue for their fees—a right which they did not possess hitherto. It is rather regrettable that matters covered by the Legal Practitioners Act are criticized, not on the ground of principle, but on the ground of personal or class privileges. Barristers would not object to the clause of the section of the Act which demands power of attorney to be filed by the pleaders, but they object only to that portion of the clause, which require the power of attorney to be filed by the Barristers. About nineteen years ago, a pleader advocate, who was a member of the Civil Procedure Code Committee suggested that the section of the Civil Procedure Code which demanded a power of attorney from the pleaders should be deleted, but he was opposed by the Barrister members and the section was reproduced in the new Code (Act V of 1908). Now as misfortune would have it, the Indian Bar Committee consisting of an overwhelming majority of Barristers recommended that Barristers should be required to file a power of attorney, and that recommendation has become law this year on the 26th of March. The resolution passed by the Nagpur Bar Association protesting against the clause of the section requiring the power of attorney to be filed by the Barristers and Pleaders and suggesting its entire deletion was not passed on account of the desire to preserve the privileges of a particular class of lawyers but on the ground of expediency and principle. Especially in regard to appellate work it sometimes happens that papers are sent by post or through relations for filing the appeal, but the power of attorney is not sent, and waiting for the former means allowing the appeal to be barred by time. In such cases much trouble did not arise up to the present time as the appeal could be fiied by the Barrister. But great inconvenience would be now felt as this 'privileged' class of lawyers has been made to disappear by the new legislation. It may be noticed that the new Legal Practitioners Act applies to civil cases only. Though the Civil Procedure Code made a provision for requiring a Pleader to file a power of attorney, such a provision was not made in the Criminal Procedure Code. Still a pernicious practice of filing a power of attorney in criminal cases came into existence, and in criminal appeals it is oftentimes a troublesome task to procure the power from the convict in jail and file his appeal within the short period of limitation allowed by law. From the point of principle it is difficult to understand why the filing of the power of attorney was made necessary by the Civil Procedure Code and the new Legal Practitioners Act, when the Criminal Procedure Code does not require the power to be filed. Whether any modification of the new Legal Practitioners Act takes place or not, it would be better if the High Court consider the question whether it is legal to require the Pleaders (and now the Barristers also) to file a power of attorney in criminal cases. This question may be considered by them suo motu or on a request by the Bar Association to that affect, as no person convicted of an offence is likely to bring the matter before any Judge for consideration by engaging a lawyer to file an appeal against his conviction and deliber-

ately not giving him a power of attorney so as to create the question for a consideration by the Judge.

One effect of the Act is not as yet appreciated. It does not require the legal practitioners, whether Pleaders or Barristers, to file a power in these cases where they do not act, but merely plead, i. e., when they appear for respondents in appeal cases, or for non-applicants in revisional cases.

As regards the view of Mr. O'Connor to the effect that submission on the part of the Barristers to the new legislation would amount to professional misconduct, it appears that there was no one else to share that view. On the other hand it may be said that Barristers, not practising on the original side of the Calcutta and the Bombay High Courts can be charged with "professional misconduct" by the Inns of Court, because they have been hitherto dealing directly with the clients instead of dealing through the solicitors. As regards the liability of Barristers for negligence, the section in the new Act is in accordance with the view held by the Allahabad High Court in a case reported in *Budhu* v. *Davan* (1). On principle a class of legal practitioners cannot be exempt from liability for negligence and another class subjected to it. Both the classes of legal practitioners would have been very glad if the principle underlying the maxim 'King can do no wrong' would have been extended to them but that is not now possible.

(1) [1915] 37 All. 267.

EX-PARTE ASSESSMENT OF INCOME-TAX

By E. S. Sunda, Esq., B.A. B.L., *Vakil, Madura.*

Governing Clauses.

The governing sections of the Income-tax Act regarding ex-parte assessment are 23 (4), 27 and 30. The first states the circumstances under which an ex-parte assessment can be made; the second offers a locus penitentiae for the defaulting assessee and the third denies the right of appeal, through its proviso "provided that no appeal shall lie in respect of an assessment made under sub-S. (4) of S. 23 or under that sub-section read with S. 27."

What is really an Assessment under Sec. 23 (4) ?

When the right of appeal is denied and a jurisdiction similar to the powers of review is given to the I. T. Officer under S. 27, who may or may not care to give up his original assessment, and when the assessee has no chance at all to appeal to the discretion of any other officer, the position of the assessee becomes rather hard and the powers of the I. T. Officer become almost unlimited. Naturally great importance attaches to the orders really passed under S. 23 (4).

An order under S. 23 (4) may be the result of one or other failings of the assessee among the following:

(i) If the principal officer of any company or any other person fails to make a return under sub-S. (1) or sub-S. (2) of S. 22 (Return of Income).

(ii) If he fails to comply with all the terms of a notice issued under sub- S. (4) of Section 22 (demanding production of such documents and accounts as the Income-tax Officer requires.)

(iii) or having made a return, fails to comply with all the terms of a notice issued under sub-S. (2) of Section 23 (Notice to the assessee to attend the I. T. Office or to produce such evidence on which the assessee may rely in support of his Return of Income).

Orders passed by the Income-tax Officer in the case of the defaulting assessees under the first of the above types can be easily disposed of. Failure to make the return gives the Income-tax Officer immediately jurisdiction to issue his fiat under 23 (4).

But the second and third give some trouble; and when they are read along with S. 27 the situation becomes more complex. As the orders under S. 23 (4) deprive the assessee of the right of appeal, it is very important that we understand the full scope and limitations of the basis of this ex-parte assessment as detailed in S. 23 (4). A strict adherence to the words of this penalizing section is very important, and the Income-tax Officer as an officer of the Crown armed with powers under a fiscal statute, should first satisfy

himself of his powers to pass the order under the particular circumstances of each case. Besides the pecuniary and mental trouble a poor unfortunate assessee may experience by the whimsicalities of an Income-tax Officer, there is the sweeping impression created in the minds of the public that the Government through its 'own officer is perpetrating injustice *even without a right of Appeal.*

The second of the three occasions stated above enjoins on the assessee to produce the accounts and documents as the Income-tax Officer requires. This is fairly definite by itself. A failure, without no other extenuating circumstance, invests the Income-tax Officer, with powers to proceed with an ex-parte assessment. But the notice under S. 23 (2) does not make the petition of the assessee so very definite. The assessee produces such evidence (accounts) on which such person relies in support of the return. This evidence may not be useful to the Income-tax Officer, and may be even useless for the purpose of the assessment. The question is: Does this worthlessness of the accounts give scope for the Income-tax Officer to proceed under S. 23 (4) or is he to ask again the assessee to meet him on specific points under 23 (3) (" such other evidence as the Income-tax Officer may require on specified points"). Can he again refuse to reopen the assessment under S. 27, stating that the evidence adduced by the assessee is worthless and that " no useful purpose will be served by reopening the original assessment made under S. 23 (4)" (the amiable excuse that finds a place in almost all orders passed under S. 27 coupled with S. 23 (4)?

Much depends on the interpretation and discretion of the Income-tax Officer himself. Want of it at times produces all the trouble. An instance of a curious indiscretion committed by an Income-tax Commissioner is seen in the case of *Raghu Nath Mahadeo* v. *The Commissioner of Income-tax, Bihar and Orissa* (A. I. R. 1925 Patna 694). The relevant portions of the judgment read: Dawson-Miller, C.J. observes: The assessee did attend and he did produce the evidence upon which he relied in support of his return, but that evidence, as I have said, was not treated by the Income-tax Officer as conclusive of the matters which he had to determine. Nevertheless the assessee did attend at the office and he did produce the evidence upon which he relied. In other words he complied with notice issued under S. 23 (2). The learned Commissioner seems to have thought that because the books were not relied upon by the Income-tax Officer, therefore the assessee had not complied with the notice served upon him under S. 23 (2). I cannot however take this view....It seems to me that the assessment in the present case was carried out under that sub-section. He saw the witness, he considered the evidence produced by him and upon which he relied and he thereupon made his assessment....So there can be no doubt whatever that the opinion of the Income-tax Officer was that he was acting under sub-S. (3) of S. 23.

Again on page 695 Dawson-Miller, C. J. very pertinently observes as follows: ".The Commissioner seems to imagine that the assessee in this case had failed to comply with the terms of the notice under S. 23 (2). In my opinion he did nothing of the sort. All that the notice required and could require was that the assessee should attend at the Income-tax Officer's office and should produce such evidence as he—the assessee—relied upon in support of the case. That he did and the mere fact that the Income-tax Officer did not accept that evidence as conclusive of the matter does not appear to me to bring the case within the provision of S. 23 (4).

So Dawson-Miller, C. J., questioned the view of the Commissioner that such an order was an order under S. 23 (4) and was not appealable. *A. I. R.* 1925 *Patna* 694 is a clear case to show how the very top of the Income-tax Department takes a wrong view of sub-S. (4) of S. 23. Fortunately in this case the Assistant Commissioner thought that there was a right of appeal under the circumstances, but his chief would negative it. So the type of an order—whether it is under S. 23 (3) or 23 (4)—is itself disputed leaving the unfortunate assessee without the right of appeal. The hardship, such type of orders under 23 (4) would work is aggravated by the Notes and Instructions issued to the officers concerned in the Income-tax Manual, Instruction No. 73, p. 110-1, first edition.

Restrictions on appeals contained in the proviso to S. 30 (1), which definitely forbid the entertainment of any appeal against an assessment where the Income-tax Officer has been compelled to make

the assessment under S. 23 (4), should be rigidly adhered to. Under no circumstances may any appeal be entertained in those cases. When the difficulty experienced by or the differences of opinion prevailing among the Income-tax Officers themselves as seen in this Patna case are so obvious, whether the Legislature can think of giving a right of appeal against orders under S. 23 (4) should be a serious subject for its consideration. I shall revert to it again in this article later.

Orders under Section 27.

S. 27 provides the defaulting assessees a chance to show good cause for cancellation of the ex-parte assessment and make a fresh assessment again more satisfactorily with the basis given by the assessee. In fact S. 27 is a remedy supplied to mitigate the seriousness of any order under 23 (4). That will be seen from the words of the two clauses themselves.

the Income-tax Officer under S. 27 are sometimes not used properly. The remarks of Kumaraswami Sastri, J., the present Chief Justice of Madras reveal remarkably the position of the assessee also. See *Siva Pratap Bhattadu* v. *The Commissioner of Income-tax, Madras* (A. I. R. 1924 Mad. 880).

"I may say at the outset that I think the officers in this case (from the Income-tax Officer to the Commissioner) have been very unsympathetic. The facts have not been found against namely, that before 1st February the petitioner's grandson was seriously ill of typhoid fever and pneumonia and that he died. It is also not found against that he had no proper help during this period and I find it difficult to understand that the plea of the petitioner's grandson was merely an excuse. It is extremely unlikely that the death of a grandson will

Section 23 (4)	Section 27.
1. If the principal officer of any company or any other person fails to make a return under sub-S. (1) or sub-S. (2) of S. 22 as the case may be.	1. When an assessee, or in the case of a company the principal officer thereof within one month from the service of a notice of demand issued as hereinafter provided, satisfies the Income-tax Officer that he was prevented from making the return required by S. 22.
2. Or fails to comply with all the terms of a notice issued under sub-S. (4) of the same section (S. 22).	2. Or that he did not receive the notice issued under sub-S. (4) of S. 22 or sub-S. (2) of sub-S. 23.
3. Or having made a return fails to comply with all the terms of a notice issued under sub-S. (3) of this section (S. 23.)	(3) or that he had not a reasonable opportunity to comply or was prevented by "sufficient cause" from complying with the terms of the last mentioned notices.

When the circumstances stated in S. 27 are existing, the Income-tax Officer shall cancel the assessment and proceed to make a fresh assessment under the provisions of S. 23. He has no powers to concede the existence of the circumstances and yet deny the assessee's right to have a cancellation and a fresh proper assessment. An imperative duty is cast on the officer to cancel the assessment in such cases. He has no alternative and he should not allow himself to be guided by other considerations. This takes us to the question of

What is "Sufficient Cause."

I shall not refer to cases under the Civil Procedure Code that define this expression. But a good case falling under the Income-tax Act itself under this S. 27 will be to the point. It is indicative of the fact how the powers given to be used by any Hindu as a pretext. If I were sitting as a Court of appeal or revision, I would have no hesitation in characterizing the proceedings as extremely harsh and the assumption baseless and in remanding the case for disposal on merits."

But later he says "what is sufficient cause" is a question to be determined by the officer who has to deal with the application for setting aside the ex-parte assessment and disposing the matter on an inspection of books.....All that the High Court can do would be to state the law as set out in *Arunachala Iyer* v. *Subbaramiah* (A. I. R. 1923 Mad. 63). And still the Income-tax Officer would be left to decide whether on these facts the petitioner had offered sufficient excuse for not appearing in time." Re. appearance *Sorabji Rustomji* v. *R. Devjibhai* (A. I. R

1924 Bom. 392) lays down the broad principles.

The wording of the proviso in S. 30 has given unrestricted powers to the Income-tax Officer regarding his discretion under S. 27. It can never be questioned except under stray cases of a reference to the Commissioner which may be of little or no profitable result.

After the powerful and frank remarks of Kumaraswami Sastri, J., is it not reasonable for us to suggest that the proviso in S. 30 of the Income-tax Act should be removed. Let the Asst. Commr. decide those points also that crop up under S. 23 (4) or S. 27. This grant ofan appeal-remedy is not new and the Civil Procedure Code certainly grants this. Orders refusing to set aside an ex-parte decree are appealable under O. 43, R. 1 (d). When such a right of appeal is granted in the case of private parties, the Government should not take shelter under S. 30 and deny the right of appeal especially when the Government is convinced that at least in one case, the Government is able to score an undeserving victory against one of its own subjects by putting a legal disability against him. Whether in these matters, the remedy should be allowed to remain with the Income-tax authorities itself is a plain question to be discussed in detail later, but the right of an appeal to a superior officer of the Income-tax Department, say an Assistant Commissioner, is only bare justice.

Again long experience may convince the Income-tax Officers that ex-parte assessment as a rule should be discouraged and that whenever an assessee offers evidence in support of his case it should be welcomed and a fresh assessment ought to be made. This procedure will certainly pin the assessee to certain ways of doing things in future and some basis of the assessee's income either for the current year or the year previous will be available to the Income-tax Department which is any day a more precious weapon to be used against the assessee than the hearsay information of an Income-tax Surveyor.

Besides in a fiscal measure in which the Government is a party, and strict judicial procedure is not available, all opportunities should be given to the private parties.

What does the Government suffer?

By a provision of an appeal-remedy, the Government is not going to suffer a great deal. As a matter of rule, they always insist on the payment of the tax assessed and the Assistant Commissioners in several ranges and the Income-tax Officers also insist on the payment of the amount even as a condition precedent to the hearing of the appeal. If an appeal is allowed, refund is ordered. As for the accumulation of the number of appeals, this is not going to add very much to the number as the Income-tax officer himself will be very cautions in using his discretion and will try to avoid opportunities of getting a stroke of admonition from his superior officer.

Consideration of the Merits of Assessment under Section 27.

In the moffusil an application under S. 27 is generally considered with the probable result that may follow by a cancellation of the original and ordering a fresh assessment. However much one may try to convince the officers that 'merits of the case' do not come in under S. 27, they are invariably considered and very often we have the statement in the order "no useful purpose will be served by a reopening of the assessment." They do not see the imperative duty cast upon them, once they are convinced of the several circumstances stated in S. 27, but they import a new reason such as the "serving of any useful purpose" before a reopening is ordered. This attitude of the officers is analogous to the actions of the judicial officers under O. 9, R. 13 of the Civil P. C. Time and again they had to be told by the High Court that is not the correct procedure, the latest being by Ramesam, J., in *Syed Mahamed Sahib* v. *Alagappa Chettiar* (A. I. R. 1926 Mad. 31). Ramesam, J., observes: In an application under O. 9, R. 13, what the Court has to find is not whether the defendant has any good defence on the merits but whether there is proper service, and it there is proper service, whether there was sufficient cause for his non-appearance. One would wish that this is embodied in the instructions issued to the Income-tax Officers in the departmental manual.

To conclude there is a strong case made in favour of a provision for appeal even in cases of assessment under S. 23 (4) and the proviso in S. 30 (1) ought to be repealed thus giving greater scope to the assessees to have their rights properly settled, the scope being none other than that granted in the Civil P. C.

SPECIALIZATION IN LAW

By Jyoti Swarup Gupta, Vakil, High Court, Allahabad.

Perhaps the value of specialization was never so well recognized as at the present day. Whatever walk of life or field of human activity we may look to, we are sure to find that it is the specialist who brings great, sometimes startling, success to the cause he undertakes. Specialization is the order of the day and it is quite unnecessary to dilate on its importance. It is in this light that I congratulate the Civil Justice Committee on introducing this principle in the sphere of administration of Civil Justice. Law by itself is a very unwieldy subject and it is daily becoming so by the ever-increasing statutory law (necessitated by the daily increasing relations between man and man), the nature and complexity of rulings which are created every day in all parts of the globe, and the complexities, technicalities and conventions which are known only to one who is well versed in law. It is literally too unwieldy for any single individual, whether at the Bench or the Bar, to do full justice to every question which may arise within its broad compass. The Civil Justice Committee has recommended specialization in commercial litigation. It was brought face to face with the difficulties which the commercial world encounters on the adjudication of their disputes being entrusted to men who are not specialists in commercial law. The report has described in great detail the evils of this system. Exports and imports suffer ; foreign business men lose faith in Indian merchants and law Courts. They are slow to enter into commercial contracts with new firms which are not already well known and which have not already built up a reputation of honesty and integrity for themselves. Indian business itself becomes slow and slack. Businessmen cannot afford to lose time or money over litigation. They lose faith in law Courts if the latter are not efficient and quick in the disposal of cases and execution of decrees. They will rather not enter into a contract than stand the risk of a protracted and costly litigation and thus waste their valuable time and energy and lock up their capital.

The Committee has recommended that a few judicial officers may be sent abroad or attached to big commercial firms in India so that they may specialize in commercial litigation. The Committee has recommended half a dozen places, like Delhi and Cawnpore, where such tribunals for administration of commercial litigation may be established. I would venture to suggest that when the principle has been recognized a wider effect may be given to it with no practical difficulty. In many places there are more than one officer of the same designation, e. g., Munsif, or Subordinate Judge. Generally a district or tehsil is broken up into two or more territorial divisions and the jurisdiction over each portion is given to each officer of the same rank. The litigants from the whole district or tehsil have not to go to the same place for disposal of their civil cases, of whatever nature they might be, but to the officer, who has jurisdiction over their division. Thus in Allahabad there are two Munsifs holding Courts quite close to each other and under the same roof. The whole of the District of Allahabad has been split up into two portions, viz., East and West Allahabad. One Munsif has jurisdiction over cases coming from East Allahabad and the other over cases coming from West Allahabad. In some places there are almost permanent additional officers who alsodispose of cases of every description.

Civil cases can be broken up into two important divisions or classes, viz.. contractual and those relating to land. I would suggest that when there are more than one officer of the same rank holding Court at the same place, instead of giving them jurisdiction on territorial basis, the work might be so distributed between them that one may have contractual or commercial cases and the other land cases ; other cases might be distributed between them according to the amount of work necessary for each. This sort of arrangement will enable officers to specialize in that branch of law for which they may have special aptitude. One Division Bench of the High Court might also consist of Judges who are specialists in commercial and contractual law. With this natural division lawyers will also begin to specialize in the branch suited to their inclination.

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ALL INDIA REPORTER
1926] (JOURNAL SECTION) [September

NOTES AND COMMENTS

S. N. Dar
Advocate High Cour
Jammu & Kashmir
Srinagar.

PRECEDENTS

19 *C. W. N.* 972

(FLETCHER, SHARFUDDIN AND BEACHCROFT, JJ.)

Though a decision even of the Privy Council is an authority only for what it decides, the general remarks of their Lordships are ordinarily considered to have binding force in this country.

LAW REPORTING RULES

Mad. L. Journal (*Vol.* 8, *page* 456) (1898).

Edited by V. Krishnaswamy Aiyar and P. R. Sundara Aiyar, afterwards High Court Judges, Madras ; and Hon. P. S. Sivaswamy Aiyar, ex-Executive Councillor, M. L. A.

It may often be useful to supplement the abstract statement of the principle of the decision by a statement of the concrete facts dealt with by the Court, but the *inclusion of irrelevant facts simply shows that the Reporter has been too lazy to master the case, and this, no doubt, is the explanation of the lengthy head-notes, extending frequently to a page of small print, sometimes to considerably more, which a long-suffering profession has to endure.* (See 22 *Bom.* 88 ; 833 ; 849 ; 861 ; 875 ; 899 ; 25 *Cal.* 354 ; 524 ; 21 *Mad.* 310 ; 20 *All.* 103 ; 267.)

Formal recitals from contracts, leases, conveyances, and testaments and *quotations* from oral testimony are often quite *unnecessary* ; the intelligent responsibility of *suppressing* the *immaterial* must be *accepted* by somebody. Surely, the manner in which these very Reports are cited in Court is often in itself a condemnation of the style in which they are prepared. You see counsel hunting about in despair for the critical facts. The *adequate citation* of a case should be the test of a good report. Again, * * *does it not too often happen that cases are reported at considerable length, which turn solely on the construction of a particular clause in a particular document, which in all human probability can never occur again in this world?* Another defect is that the use made by counsel of particular authorities in argument insufficiently appears. In a case which contains several points, *it is useless to give en bloc "authorities cited by pursuer", etc.*, especially if the authority cited itself contains as many points. Finally, what is a rubric ? Grammatically speaking, it is a direction printed in red. *It should direct us to the law of the case. But we have seen the rubric contain a precis of the whole material facts of a case, these facts repeated at greater length in the narrative, and finally stated more than once in the opinion of the Court.* To adapt the words of Milton in "Paradise Regained".

".....No law prefixed,
Directs me in the starry rubric set."

It is surely not presumptuous to suggest that rubrics are often too circumstantial, and might be written, so as more clearly to indicate the *precise effect* of the *decision* on the general principles of the law. Let us avoid, however the example of the reporter with a fatal gift for italics, who wrote "Facts *and* circumstances in which *held* that the *eldest* son was entitled to succeed to the *heritable* estate."

Reduction of Court-Fees.

It is most gratifying to learn that the Government of India will lay before the Legislative Assembly proposals to give effect to the recommendations of the Taxation Enquiry Committee. It will be remembered that the Taxation Enquiry Committee have definitely recommended a reduction of Court Fees. It is immaterial to us whether the litigant public are given relief by the Legislative Assembly or by the several local Legislative Councils. We hope that the Assembly will express its wishes on the question of reduction emphatically so that the Imperial and Provincial Governments will provide in the Budget for the next year a reduced income from Court-fees. In this connexion we have to congratulate the several Bar Associations in the Madras Presidency for the active support which they gave to the request for the reduction of Court-fees. If Court-fees are not reduced to their former levef at an early date, the evil effects of the high scale of Court-fees on the litigant public and on the legal profession will be incalculable.

The Question of Professional Conduct

The engagement of Mr. Upjohn, K. C., in an Indian appeal has raised a question of some importance and general interest to the legal profession. Many years ago it would appear that one party (who may be referred to as the first party) sent a case to Mr. Upjohn, K. C., for his opinion and obtained his opinion thereon. After the lapse of many years, when everybody had nearly forgotten all about his opinion, when the same case went up to the Privy Council, the opposite party (whom we shall the second party) retained Mr. Upjohn, K. C., to appear for him before the Privy Council, in the same case, An objection was taken that as Mr. Upjohn had given an opinion in the case. for the first party, he should not appear in the same case at a later stage for the opposite party. The matter was brought to the notice of the General Council of the Bar by the solicitor concerned and the General Council expressed their opinion thae Mr. Upjohn should not appear for the second party in the circumstances of the case. Mr. Upjohn, however. took the view that as he remembered absolutely nothing about the opinion he gave to the first party or about any of the facts of the case there was nothing in the regulations of the Bar Council which would make it improper for him to appear for the opposite party. Mr. Upjohn, K. C., contended that the regulations governing the matter do not imply a general rule that " counsel who has advised one party in a litigation cannot appear for the opposite party in the same litigation." From a strictly legal point of view Mr. Upjohn's contention may be well founded. But in a matter like this we think it would be more desirable to conform to the general spirit of the Bar and respect the decision of the Bar Council rather than dissect the regulations to justify in the letter what may be indefensible if the spirit be taken into account and if the effect on the lay public should be considered. We entirely agree with the Law Journal when it says :

> It is of the greatest importance that laymen should have the most complete confidence in the Bar and it would in some cases be impossible to convince a layman that counsel who had once advised him, however long ago, could have completely forgotten the facts of the case put before him.

Further any relaxation in this salutary rule as laid down by the Bar Council will create difficulties with reference to the extent to which a counsel can be believed when he says that he does not remember the facts of the particular case in which be appeared for the opposite party at an earlier stage. The nature of the litigation and the difference in point of time between the two stages will also create further difficulties in the matter. This question arose in this country in *Santilal* v. *Rajnarayan* (*A.IR.* 1924 *All.* 804). In this the pleader appeared for the judgment-debtors at a certain stage of the execution proceedings and at a later stage he appeared for the decree-holders in proceedings for the

execution of the same decree. Objection was rightly taken to the pleader appearing for the apposite side at a later stage. But tho Allahabad High Court held that there was nothing objectionable especially in view of the fact that when the pleader appeared for the judgment debtors, he was engaged to do a particular act after the doing of which the engagement terminated. It is, however, refreshing to turn to the opinion of the Calcutta High Court expressed in *Emperor* v. *Rajani Kanta Ghose* (*A.I.R.* 1923 *Cal.* 106) which was a reference under S. 14 of the Legal Practitioners Act. Their Lordsnips have laid down as a rule of law the rule of etiquette which has been laid down by the Bar Council, though disapproved of by Mr. Upjohn, K.C., in view of the existing regulations in England. We may be permitted to make a somewhat long quotation from the Judgment of the Calcutta High Court as the pronouncement is as clear as it is authoritative. Their Lordships say :

A legal practitioner cannot represent conflicting interests or undertake the discharge of inconsistent duties. When he has once been retained and received the confidence of a client, he cannot accept a retainer from or enter the service of those whose interests are adverse to his client in the same controversy or in a matter so closely allied thereto as to be in effect a part thereof. The rule is rigid and is designed not only to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights or the interests which he should alone represent. This is not the first instance in which the Rule has been taken and a reference may be made to the cases of *Davies* v. *Clough* (1) *Cholmondeley* v. *Clinton* (2); *Day* v. *Pousna* (3);

Fidelity is required from all who hold fiduciary relations ; they must not lightly enter upon such relationships ; but if they do, they will not be permitted to be disloyal ; and of all species of disloyalty, desertion and adherence to the enemy or to the opposite party in a suit is recognized as the worst.

The Madras High Court has taken the same view. It is better to have an absolute prohibitory rule instead of having a rule of a permissive character which will necessitate a collateral enquiry on every occasion into the question whether the counsel remembered the facts of the case at the time of his appearing for the opposite party. At least in India in the present condition of the legal profession it is unnecessary to have any permissive rule. An absolute prohibitory rule will save a vacillating member of the Bar from committing an error and at the same time would enhance the dignity of the profession in the eyes of the public.

(1) [1837] 8 Sim. 262.
(2) [1815] 19 Ves. 261.
(3) [1842] 5 Ir. E. R. 24.

Politicians and the Judiciary.

Our readers will remember that the legal opinion of Sir John Simon and the judgment of Mr. Justice Astbury in the *National stilors' and Firemen's Union* v. *Reed and others* were mainly responsible for the early collapse of the General Strike in England. Writing about the Astbury judgment in the *Socialist Review* Mr. Ramsay Macdonald ex-premier writes thus.

A Judge of the High Court went out of his way in delivering a judgment on a trade union case. He expressed opinions on matters not argued before him and upon which he had heard no evidence. These opinions were of no more value and could claim no more respect than the non-sense talked by the most ignorant lady in a drawing-room. The Bench has the right to claim immunity from censure only so long as it is a judicial body and confines itself to the purpose of its function, but it is intolerable that any Judge like Mr. Justice Astbury should abuse his office and express opinions which, whether bawled at street corners or drawled in Courts, are nothing but rubbish. The true sedition-mongers and disloyalists were those magistrates and Judges who failed in their duty and undermined the respect which we owe to them. In the case of the judgment in question, he only reminded us that he has never tried to take a trade union fence without going a cropper and that hitherto appeal has invariably upset his decisions.

Mr. Macdonald has not done justice to himself or to the party which he represents by writing as he has done. The Law Journal after commenting upon the extravagant language employed by Mr. Macdonald points out that only in two cases have the decisions of Mr. Justice Astbury on Trade Union law been appealed from. In one case *Whyte* v. *Reilly* his decision was reversed ; while in the other *Dodd* v. *Amalgamated Marine Workers Union* his decision was affirmed. These facts show how improper and baseless are the suggestions made by Mr. Macdonald from whom one should expect a greater respect for the judiciary and the administration of justice.

Income-tax on the Surplus Income of our Universities.

Our readers may be aware that the Incorporated Law Society of England are conducting examinations for which they are in receipt of a fee income from candidates. It was found that last year the fee income was in excess of the expenditure incurred by the Society for the conduct of the law examinations. The income-tax authorities in England have intimated to the council of the Law Society that a claim may be made for income-tax on the surplus of the examination fund. We understand that the claim is likely to be contested in the Courts. In India, if the income-tax authorities are so minded, the question may well arise in a concrete form. The budgets of many of our Universities, old and new, show an enormous surplus in the fee fund account. Strictly speaking the surplus is liable to pay income-tax especially when the surplus is unspent and carried forward to the next year's account. The one good result such a claim may have will be a reduction in the fees levied from the candidates so as to make the fee cover the exact expenses incurred by the University for the conduct of the examination concerned. Even assuming that the surplus income in the fee fund account is applied within the year to meet other expenditure of the University, so long as the fund account is kept and maintained as a separate account, the question whether the income is not taxable is not free from difficulty.

Articles

Plea of a Pre-decree Agreement in Bar of Execution.

It is a well-known rule that an executing Court cannot go behind the decree and that it must execute the decree as it finds it. Any agreement entered into between the Judgment-creditor and the judgment-debtor, which will operate in partial or entire discharge of the decree, will not be recognized by the Court until the same is duly certified by the Court under the provisions O. 21, R. 2, Civil P. C. The existence of such an agreement and the judgment-creditor's prosecution of the execution proceedings may give rise to an action for damages for breach of the agreement or for an action praying for an injunction restraining the decree-holder from proceeding with the execution in contravention of a post-decree agreement. When the law is so strict, even in the matter of post-decree agreements, a fortiori, it must be even more stringent in the matter of admitting pre-decree agreements as valid defence in execution proceedings.

Pre-decree agreements may be classified under two heads, viz., (1) agreements entered into between the parties prior to the institution of the suit, and (2) agreements entered into between the parties during the pendency of the suit, i. e., after the institution of the suit and before the decree is passed. Agreements coming under the first category, when they provide for the mode of execution or provide that the decree be not executed either wholly or in part, should, properly speaking, be pleaded as substantive defence to the suit. Under S. 11, Explanation 4, Civil P. C., such an agreement should be treated as matter which might and ought to have been made ground of defence or attack. The principle of constructive res judicata will apply not only to two different suits but also to different stages of the same suit. If a defendant omits to raise an available defence and permits the passing of a decree against him throwing on him a much larger liability than he is bound to bear, he should not be heard to say in execution proceedings that although the decree ex facie fixed a certain liability upon him there was really no liability which he was bound to discharge, or his liability was much less than that imposed by the decree. If he should be allowed to raise such a plea it will be in effect giving the go-by to the doctrine of constructive res judicata.

With regard to pre-decree agreements coming under the second category the case for not allowing such agreements to be pleaded in bar of execution is even much stronger. The Court can take notice of facts occurring during the pendency of the suit. It is even the duty of the parties to bring to the notice of the Court the coming into existence of an agreement which would affect the points in issue in the suit. Under the provisions

of O. 23, R. 3, Civil P. C., it is the duty of the Court to record such agreements which can be brought to the notice of the Court either by the plaintiff or by the defendant. This provision is not merely an enabling provision. Further, it appears to us that it is merely an abuse of the process of the Court and waste of judicial time if parties should be permitted to carry on a mock fight over settled claims and to obtain a decree which will be only a brutum fulmen. In this view it is not right that a judgment-debtor should be permitted to raise the plea of a pre-decree agreement in bar of execution proceedings.

One should not expect any divergence of judicial opinion on a point like this. It is, however, regrettable to find that there is divergence of opinion the propriety of which we shall presently examine.

The decision of a Full Bench of the Bombay High Court in *Laldas Narandas* v. *Kishordas Devidas* (1) raised this question in this form for the first time, and considered the prior decisions of the Bombay High Court in 10 *Bom. H. C. Reports* 361 ; 11 *Bom.* 708 ; and 17 *Bom.* 23 ; and of the Calcutta High Court in 21 *Cal.* 437. The judgment of Ranade, J., is the fullest of the opinions delivered by the learned Judges who constituted the Full Bench. This was a case of a pre-decree agreement entered into before the institution of the suit. The question referred to the Full Bench was framed thus :

> Whether the existence and validity of such an agreement as the defendant relies on ought to be determined in execution under the provisions of S. 244 of the Civil P. C. or in a separate suit.

The learned Judges did not consider the question whether the defendant will not be precluded by the principle of constructive res judicata from pleading this agreement. Of course the validity of such a plea and the question of res judicata can be determined only when the Court has seisin of the matter either in its execution department or in its original jurisdiction by way of separate suit. The Full Bench naturally dealt with only the forum which has to adjudicate upon this question. S. 244 Cl. (*c*) of the Civil P. C. of 1882 did not in its original form contain the words "or to the stay of execution thereof." These words were added by Act VII of 1888. After the amendment of 1888 the language of S. 244 made it imperative that any question relating to the stay of execution of the decree should be determined only by the executing Court. Ranade, J., observed with reference to the prior Bombay cases :

> In the one case, as in the other, the question really turned upon the point whether the prior agreement could or could not be pleaded as defence before the decree was passed. When it could be so pleaded and was not pleaded in the course of the hearing of the suit, Mr. Justice West held that it could not be so pleaded afterwards in bar of execution. When it could not be pleaded, Sir C. Sargent held that it might furnish a cause of action for a suit to restrain the other party from breaking the agreement.

The learned Judge distinguished these two cases on the ground that the case before him was not one of a total non-execution, but was only a case of a stay of execution under certain conditions and that therefore the amended S. 244 brought this matter clearly within the jurisdiction of the executing Court. It was therefore decided that the judgment-debtor could raise this plea in execution proceedings. The Calcutta decision in 21 *Cal.* 437 was distinguished as one relating to a post-decree agreement which remained uncertified. The Full Bench did not give any decision on the wider question whether its answer would be different in the case of a pre-decree agreement providing for the total non-execution of a decree. It has also to be remembered that the words "or the stay of execution" which were introduced into S. 244 by the amending Act of 1888 have now been deliberately omitted in S. 47 of the new Code. The omission of these words must be given due weight in answering this question with reference to the new Civil Procedure Code.

The view of the Calcutta High Court, however, has been consistently against the executing Court examining a pre-decree agreement in bar of execution proceedings. *Chhoti Narain Singh* v. *Rameshwar Koer* (2) expressly held that a pre-decree agreement cannot be pleaded as a bar in execution proceedings. The first step of their reasoning is that an executing Court cannot go behind the decree or question its validity. Their second argument is that questions under S. 244, Cl. (c), relating to the execution of a decree, and arising between the parties to a suit in which the decree was passed or their representatives, must be such as have reference to matters arising

(1) [1898] 22 Bom. 463.

(2) [1902] 6 C. W. N. 796.

subsequent to the passing of the decree and not antecedent to it. This argument gives full effect to the words of S. 244 and it has not been as yet met by any of the learned Judges who take the contrary view.

The same view was taken by another Bench of the Calcutta High Court in *Benode Lal Pakrashi* v. *Brajendra Kumar Saha* (3) though the report does not show that the decision in *Chhoti Narain* v. *Rameshwar Koer* (2) was brought to their Lordships' notice. The case in *Laldas Naraindas* v. *Kishordas* (1) was distinguished by the learned Judges on the ground that the Bombay Full Bench had to deal with a case where the suit was for the filing of an award, and the agreement was antecedent to the award. We do not see much point in this distinction. If the agreement was come to prior to the institution of the suit it is immaterial at what point of time or in what circumstances the agreement relied upon was arrived at.

We therefore welcome the decision of the Calcutta High Court in *Hassan Ali* v. *Gouzi Ali Mir* (4) where their Lordships straightaway dissent from the view of the Bombay Full Bench in 22 *Bom.* 463 and follow the Calcutta authorities in 6 *C. W. N.* 796 and 29 *Cal.* 810. They present the argument in the following lucid terms:

> In my opinion cases can only be inquired into under S. 244, when the existence of a decree which is susceptible and capable of execution is conceded and it does not apply to a case when the object is to impugn the decree itself, or to set up a case inconsistent with the decree which it is sought to execute. In other words, S. 244 presupposes the existence of a decree validly susceptible of execution. The respondents say the decree is only a paper decree and there was an anterior bargain that it was not to be executed, and that therefore the decree is not susceptible of execution. The Court cannot go into the question of any such bargain under S. 244.

The Calcutta view has been uniform and we are not aware of any subsequent case where there has been any departure from this view.

The Madras view, however, has not been quite uniform. The earliest reported case of the Madras High Court is *Krishnamachariar* v. *Rukmani Ammal* (5) In this case the admissibility of this plea in execution proceedings was taken for granted by counsel and the learned Judges. The case turned upon the question whether the document embodying the pre-decree agreement required registration. This case is therefore of no authority on the point before us. In *Rukmani Ammal* v. *Krishnamachari* (6) the question was gone into and *Laldas Naraindas* v. *Kishordas* (1) was followed and 29 *Cal.* 810 was distinguished. Their Lordships took the view that the agreement was not as to the validity of the decree but as to the existence of an agreement to stop the enforcement of the decree.

When we come to *Subramanya Pillay* v. *Kumaravelu Ambalam* (7) the view of the Madras High Court becomes even more pronounced. The Bombay view is followed and the Calcutta view is expressly dissented from. This was a case under the new Code. The argument based on the omission in the new Code of the words "to the stay of execution" that were found in S. 244 by reason of the 1888 amendment is brushed aside with the suggestion that the Legislature may have regarded the words omitted as surplusage. The arguments advanced by the Calcutta High Court in support of their view have not been dealt with and the theory of surplusage is exploded by the legislative history of the words in question.

In this state of the Madras authorities it is natural to expect a Full Bench reference. *K. A. N. Chidambaram Chettiyar* v. *Krishna Vathyar* (8) is the case which came before the Full Bench of the Madras High Court. This was a case where the pre-decree agreement was only to stay execution for a definite period. Abdur Rahim, Offg. C. J., and Seshagiri Ayyar, J., took the view that such a pre-decree agreement can be pleaded as a bar in execution proceedings while Phillips, J. dissented and held that it could not be pleaded. The majority Judges base their view upon the doctrine of stare decisis as far as the Madras Court was concerned. To invoke the doctrine of stare decisis the following cases were relied upon : *Rama Ayyan* v. *Sreenivasa Pattar* (9), *Rukhmani Ammal*

(3) [1902] 29 Cal. 810=6 C. W. N. 838.
(4) [1904] 31 Cal. 179.
(5) [1905] 15 M. L. J. 370.
(6) [1910] 9 M. L. T. 464=8 I. C. 1071=(1910) M. W. N. 798.
(7) [1916] 39 Mad. 541=33 I. C. 66.
(8) [1917] 40 Mad. 233=32 M. L. J. 13=(1917) M. W. N. 44=37 I. C. 836=5 L. W. 132 (F. B.)
(9) [1896] 19 Mad. 230=5 M. L. J. 218.

v. *Krishnamachari* (6), *Krishnamachari* v. *Rukmani Ammal* (5), and *Subramanya Pillay* v. *Kumaravelu Ambalam* (7). The case in *Rama Ayyan* v. *Sreenivasa* (9), is with reference to a post-decree agreement and therefore is irrelevant. The decision in *Krishnamachariar* v. *Rukmani Ammal* (5) in 1905 simply assumed the question without any discussion. The other two decisions are of 1910 and 1916. The doubtful decisions in these two cases cannot be treated as sufficient for the application of the principle of stare decisis. The majority follow the Bombay Full Bench view in *Laldas Naraindas* v. *Kishordas* (1) and the Allahabad view to the same effect in *Gawri Singh* v. *Gajadhar Das* (10). The Calcutta cases are cited but dissented from although it is admitted that there is undoubtedly a great deal to be said in favour of the view taken in Calcutta.

The dissenting judgment of Phillips, J. discusses the question in all its aspects with reference to the language of the section and the authorities of the different High Courts. His Lordship rightly dissents from the view that the words "and to stay of execution" deliberately introduced in 1888 were omitted as a surplusage in 1908. He also lays stress upon the argument that in such cases, the conduct of the parties amounts to an abuse of process of the Court. There is also much to be said for his view that this is not a case for the application of the doctrine of stare decisis for a change in procedure will operate only in the future and will not affect vested rights. In any view, the Full Bench dealt with a case of only postponement or stay of execution. This position admits the validity of the decree and does not go behind it. But the case where the agreement provides that the decree shall not be executed at all must stand on a different footing.

It is interesting to note that the fact that the distinction between a stay of execution and total or partial executability is real, is recognized by Seshagiri Ayyar, J. who was a party to *Chidambaram Chettiyar* v. *Krishna Vathyar* (8). In the next case to which he was a party, viz., *Arumugham Pillay* v. *Krishnaswamy Naidu* (11) Oldfield and Seshagiri Ayyar, JJ. distinguished the Madras Full Bench view and held that a pre-decree agreement for the decree being treated as in part inexcutable cannot be pleaded in execution proceedings. They further held that the remedy, if any, for the aggrieved judgment-debtor was by proceedings to have the decree set aside. In *Koonammeni Mallaya* v. *Kanneganti Chinna Kotayya* (12) the Madras High Court further departed from its view in 40 Madras. If we may say so with respect, the judgment of Spencer, J. contains an accute criticism of the prior Madras cases. He doubts the correctness of the decisions in *Krishnamachariar* v. *Rukmani Ammal* (5) and *Rukmani Ammal* v. *Krishnamachariar* (6) His Lordship says

> a party who collusively allows a Court to pass a decree at the same time privately agreeing with the plaintiff that such a decree should not be enforced is, in my opiniou, committing a fraud on the Court which should not be countenanced by permitting him to put forward such a plea in execution.

The decision in the Calcutta High Court in *Hassan Ali* v. *Gowji Ali Mir* (4) is held to be perfectly sound and is expressly followed. The cases to the contrary are either distinguished or dissented from. His Lordship held in very general words that an agreement which, if raised in the suit itself would negative wholly or partially the plaintiff's claim, cannot be pleaded as defence to the execution of the decree.

In *Ramanathan Chettiyar* v. *Venkatachalam* (13) the Madras High Court went further and doubted the correctness of the Full Bench decision in *Chidambaram Chettiar* v. *Krishna Vathyiar* (8). They expressly followed, as laying down sound law, the decision in *Arumugham Pillai* v. *Krishnaswami Naidu* (11).

Tbe next decision in *Arunachala Gounden* v. *Swaminatha Iyer* (14) simply refers to the Full Bench case in *Chidambaram Chettiar* v. *Krishna Vathyiar* (8) and follows it without noticing any of the three later decisions of the Madras High Court which so pointedly doubted the decision of the Madras Full Bench in *Chidambaram Chettiar* v. *Krishna Vathiyar* (8).

(10) [1909] 6 A. L. J. 403=2 I. C. 608.
(11) [1920] 43 Mad. 725=39 M. L. J. 222=56 I. C. 976=12 L. W. 41.
(12) [1921] 14 L. W. 317=64 I. C. 148=(1921) M. W. N. 382.
(13) A. I. R. 1923 Mad. 619.
(14) A. I. R. 1924 Mad. 611.

When the matter again came up in *Velu Thevan* v. *Krishnaswami Reddi* (15) their Lordships simply followed the Full Bench view in 40 *Mad.* The Division Bench felt bound to follow the decision of the Full Bench without whittling down the effect of even the obiter dicta. The persistent attempt to have the matter reconsidered by a Fuller Bench met with no success.

Madhavan Nair, J., who was a party to *Velu Thevan* v. *Krishnaswami* (15) with Wallace, J., in *Venkatasubha Mudali* v. *Manickammal* (16) re-affirmed his view with reference to the Full Bench decision and laid down the law even in wider terms than the Full Bench decision warrants. The Full Bench itself justified its view on the principle of stare decisis. From a logically sound position logical developments of the law are no doubt permissible. But it is inconceivable how any logical development can be allowed from an admittedly illogical position which is tolerated solely on the principle of stare decisis. In 49 *Madras* they fastened upon the words " to stay of execution " and argued if an agreement for stay of execution can be permitted to be pleaded as the Madras Full Bench did, it logically follows that an agreement for stay of execution for all time, in other words, a pre-decree agreement that the decree should be inexecutable should be also permitted to be pleaded. This seems to be an unwarranted and illogical development of a position recognized almost by way of exception. There have been practically three groups of cases even in the Madras High Court alternating from one position to the other—a curious development indeed from the application of the stare decisis principle with a vengeance. Wallace, J., says,

> I have no doubt that the concurrent Judges did intend to take their stand on the wider principle enunciated in these cases and that they meant to uphold and confirm that principle and lay down that this Court in doing so was proceeding on the principle of stare decisis.

We think it much better to follow what is expressly laid down without speculating upon what the learned Judges meant. It is well recognized that, subsequent to the 40 *Madras* case there have been two divergent lines of decisions. In view of this state of the case-law the learned Judges would have done well to have referred the matter again to a Full Bench. In any event the decision should have been confined to the limited proposition that was expressly laid down by the Madras Full Bench. In our opinion the decision in *Venkatasubba Mudali* v. *Manickammal* (16) is not correct from the point of view of authority or of principle. We hope that no opportunity will be missed to have this matter referred to a Fuller Bench of the Madras High Court.

(15) A. I. R. 1925 Mad. 591.
(16) A. I. R. 1926 Mad. 582=49 Mad. 513.

Reviews of Books

The Indian Penal Code—By Dinesh Chandra Roy, Vakil, High Court, Calcutta : Published by Messrs. M. C. Sircar and Sons, Calcuttta : Price Rs : 10 pp. Royal Octavo, over 1300.

The works published by M. C. Sirkar and Sons are well-known for their exhaustiveness and the Commeutary in question is no exception to the rule. All the parallel references including those of the " All India Reporter " are given though not in all places. The author has attempted to follow the ideal of diving deep beneath the sea of seemingly unconnected provisions and of helping in a thorough grasp of the underlying principles. Case-law up to the end of February 1926 has been referred to, but the bulk of the work is mainly due to the fact that copious extracts from the important judgments of the Privy Council and the Courts in England as also of the different chartered High Courts and the other High Courts in India and Burma have been given in the commentary for facility of reference important passages of the extracts have been italicized. English cases have been drawn upon wherever they have been considered to be useful, either as precedents or as indicating principles applicable in the administration of penal law in India. The other usual features of other commentaries are also noticeable in the work under review.

THE

ALL INDIA REPORTER

1926] (JOURNAL SECTION) [October

PRECEDENTS

38 MAD. 941 AT 942 (SADASIVA AIYAR AND TYABJI JJ.)

A decision of the Privy Council though not in a case arising from India is binding on the Courts in India.

LAW REPORTING RULES

Mad. L. Journal (*Vol.* 3, *page* 223) (1893).

Edited by V. Krishnaswamy Aiyar and P. R. Sundara Aiyar, afterwards High Court Judges, Madras ; and Hon. P. S. Sivaswamy Aiyar, ex-Executive Councillor, M. L. A.

Documents and pleadings should never be quoted in extenso, unless the precise words used are material, which, in India, where pleading is informal and conveyancing unknown, can rarely be the case. *The construction put upon any material document by the Court can usually be found shortly stated in the judgment*, and can be stated as one of the facts of the case ; *the document itself and the argument by which the Court arrived at a particular construction may generally be omitted both from the statement of facts and the judgment itself.* If, however, it is necessary to quote a document, only so much should be given as is absolutely necessary, and that *should be printed in small type*, and should not be again repeated in the judgment, For example, if the Court has held as a fact that a document is a usufructuary mortgage without a covenant to pay the mortgage-moneys, it is not necessary to set out the document in full, or to exemplify the quaint pleading of the mofussil by reciting the whole plaint : cf. 21 *Mad.* 476 ; 25 *Cal.* 693 ; 694. It is true that this method adds more than a page to the Reports ; but that is another story. Neither is it necessary, in a case in which the questions are whether a grant of probate shall be made to a person as executrix according to the tenor, and on what portions of the estate the Administrator-General is entitled to charge commission, to set out a lengthy and informal holograph will and two codicils, which extend over more than *four* pages of small type : cf. 25 *Cal.* 66—71 ; 22 *Bom.* 355 ; 21 *Mad.* 310. The former question is, moreover, merely one of the intention of the testator, and should not have appeared in the report at all.

NOTES AND COMMENTS

The English Law of Real Property.

The average Englishman is conservative and clings to the customs, conventions and traditions of his country irrespective of any logical considerations. Especially in the law of property, real and personal, this conservatism is most pronounced. The innumerable amending Acts on the law of real property for the last many years show that the legislator will move only when he is compelled to move by irresistible forces. It is therefore not surprising that when the epoch-making Real Property Amendment Acts of 1925 came into force, there was so much controversy. The Acts came into force only this year, and before the completion of even one year a large section of the legal profession have begun to criticize adversely the recent amendments. The Council of the Law Society have suggested to the Lord Chancellor that a new committee of experts, including practising conveyancing solicitors, should be appointed to consider, the points arising and to make suggestions for suitable amendments. One may agree or not with this attitude of the Council which some people may characterize as irresponsible criticism without giving a fair chance to see how the new law works. But we in India should note the alertness with which responsible professional bodies deal with parliamentary enactments both before and after they become law. The executive committees of the several Bar Associations in this country do not give to the work of examining proposed legislative measures the attention which they are bound to give. The legal profession should realize that in matters legal they are in a sense trustees bound to safeguard in every conceivable manner the interests of citizens and litigants.

Legal Research

The law libraries in this country, whether attached to the superior Courts or maintained by lawyers, are generally imperfectly equipped from the point of view of the research worker. The libraries attached to our superior Courts are over-stocked with all kinds of reports, ancient and modern and a multitude of text-books of practical utility from the point of view of the busy legal practitioner. Well-known works on Jurisprudence, International Law, Historical studies in the development of the Law and theoretical expositions of the different branches of law are conspicuously absent. Even all the well-known and available books in the English language on particular legal topics are not collected It is no wonder that the great works written by the continental jurists of the German, French and Russian Universities are not even known by name. The libraries attached to our Law Colleges have a better collection from the point of view of the research worker. But there is no link or co-operation between the libraries of the Law Colleges and the libraries of the Superior Courts or the libraries of the Bar Associations. It would be much better if three or four law libraries in each centre come to an understanding to specialize in particular departments of higher legal studies and to make the libraries as complete as possible. Unless there is some such division and specialization it is impossible to bring within the easy reach of the pleader and the research worker the vast material that is necessary for any useful and systematic work in legal research. We must admit that Indian lawyers have not so far given sufficient attention to the growing volume of literature on International Law private and public. We feel that the reputation of Indian lawyers, which is already acknowledged in the field of practice of the profession, should be kept up in the same degree in the field of advanced legal research and the prosecution of studies which may be described as purely scientific without any immediate utilitarian value for the busy practitioner.

Articles

LAW OF REGISTRATION AND AGREEMENT TO SELL.

(BY MR. M. R. BOBDE, B.A., L.L.B., HIGH COURT PLEADER, NAGPUR)

The decision of their Lordships of the Privy Council as reported in ALL INDIA REPORTER 1926 PRIVY COUNCIL 94 must cause no little flutter in Indian legal circles. Overruling the Courts in Punjab, their Lordships have held in that case that an agreement in writing for the sale of immovable property under which the buyer had paid a sum exceeding Rs. 100 to the seller by way of earnest money, was compulsorily registrable, the result being that the buyer who as plaintiff sought specific performance on foot of a written but unregistered contract of sale was non-suited.

Unfortunately the plaintiff-respondent in the case was not represented and their Lordships were required to hear the appeal ex parte, not having had the advantage of the other side of the matter being placed before them. Because, if that had been done, it is difficult to imagine how their Lordships could be persuaded to upset the only possible view which could be taken and was taken by the two Courts in India regarding the provisions of the Registration Act and the Transfer of Property Act.

It is to be regretted that their Lordships' attention was not attracted to S. 54 of the Transfer of Property Act and particularly its last paragraph which provisions furnish the true key to the solution of the question involved. Theprovisions of that section are categorical and they are to the effect that a contract of sale does not by itself create any interest in or charge on the property agreed to be sold. It seems permissible to speculate that their Lordships allowed themselves to be guided in this matter by an assumed analogy between the law in India and the English Law, under which latter the moment the contract of sale is made the seller becomes the trustee of the purchaser in respect of the property sold. That is indeed not the law in India, as will be found elucidated by their Lordships of the Madras High Court in I. L. R. 39 *Mad.* 462 in which it has been very pointedly brought out that in this country a contract of sale amounts merely to a personal contract from which what forthwith emerges is only a right in personam.

While thus their Lordships missed the obvious bearing of S. 54 of the Transfer of Property Act on the question for decision, they have imported into their ratiocination the provisions of S. 55, Cl. (6) (b) of that very Act which, however, is of questionable relevancy in the discussion and yet really forms the pivot of their Lordships' judgment. Their Lordships' reasoning is that, if a charge results in favour of a buyer from a contract of sale in virtue of S. 55 Cl. (6) (b) aforesaid, such contract of sale, if in writing, must be compulsorily registered as falling under S. 17 (1) (b) of the Registration Act and not under S. 17 (2) (v) of the same Act. But this argument answers itself ; because, if the document embodying the contract does not by its own terms create a charge but a charge is extraneously constructed purely by force of the provisions of S. 55 Cl. (6) (b) *ibid*, it is not quite understandable how such statutory charge could react on the document so as to require it to be compulsorily registered, as if it were itself an instrument of charge. It is plain that what renders the documents compulsorily registrable is their actual contents and not their derivative resultants such as for instance, the statutory charge provided for by S. 55 Cl. (6) (b) *ibid* is in relation to the document embodying the contract of sale. Moreover as that section itself provides, it all depends on supervening developments whether a charge would at all result or not , so that the written contract of sale, even if it might afford some nucleus for the statutory charge can by no means be its determining motive cause because what actually procreates this statutory charge is the buyer's justifiable refusal to accept the delivery of the property which has been urged to be sold. And in the particular circumstances in which the question arose before their Lordships, the emergence of the charge was an inherent impossibility, because, far from refusing to accept the delivery

of the property, the plaintiff buyer insisted upon it and claimed specific performance of the contrat of sale. If, therefore, a charge might or might not result from a contract of sale in virtue of S,55 Cl. (6) (b) *ibid* according to circumstances and if, for instance, such a statutory charge actually did not, as it could not emanate in the circumstances of the case before their Lordships, it seems self-evident that a document embodying the contract of sale could not be deemed as by itself creating that statutory charge so as to become compulsorily registrable under S. 17 Cl. (1) (b) of the Registration Act as has been held by their Lordships of the Privy Council.

Considerable embarassment will have been caused in this country by the ruling of their Lordships, during the next few years so as to exercise the utmost ingenuity of the Bench and Bar in their struggle to explain away and escape from their Lordships decision until is created an enough volume of opinion, as was done over the famous Sahu Ramachandra's case, and their Lordships take the opportunity to recast their view.

Reviews of Books

The law of Transfer—By Sir Hari Singh Gour, *Kt.*, M.A., LITT., D.C.L., LL.D., M.L.A., 5th Edition (1926), pp. over 2800; Price Rs. 45 (3 Vol.); published by Messrs. Butterworth & Co. Ltd., Calcutta.

This monumental work on the Law of Transfer is the most exhaustive work on the subject. Notwithstanding careful nursing at the hands of the most leading jurists of the day the law on the subject has been somewhat abstruse and aphorostic as it has been codified by condensing it within the space of 135 short sections. The subject therefore requires a careful and exhaustive commentary. Since the first edition of this work was published in 1901—the maiden attempt of the author—it has held the foremost rank among the commentaries on the subject.

The author does not aim to substitute the several portly tomes dealing with the law of real property in England, by the work under review, but attempts to meet the requirements of the profession in India; and how the profession has taken to it can be easily imagined from the fact that it has undergone the fifth edition. The growth of case-law and the more minute treatment of the subject-matter has increased the bulk of the work from one volume of the first edition to the present three volumes of over 2,800 pages, and notwithstanding the addition of over 2,500 cases since the fourth edition the work must not by any means be regarded as over-exhaustive of the various subjects dealt with by it, nor indeed could it be exhaustive in respect of cases decided by the several High Courts. But as the author has attempted to appeal to and apply as far as possible the first principles of law independently of the conflicting cases whatever changes may be effected in the near future, these changes are not likely to materially affect the statement of law embodied therein. As a matter of fact one of the several suggestions made in the previous editions of this work has been the subject of the Act XXVII of 1926 which embodies his view on the subject of attestation. In view of the enormous growth of case-law it is a question whether the Act should not be revised. The author has attempted to bring the case-law down to June 1926.

Trial of Katharine Nairn: Edited by William Roughead: Notable British Trial Series: over 250 pp. published by Messrs. Butterworth & Co. Ltd., Calcutta.

This 38th book in the Notable British Trial Series keeps up the standard maintained by the series. As is usual in this series the exhaustive introduction extending over 64 pages only increases the desire to read the details of the whole trial. The case of Katharine Nairn is one of the most interesting and remarkable of Scottish trials. It is not often that the public are privileged to know the private mind of crown counsel concerning a criminal prosecution; but owing to the labours of the editor here the reader is afforded a unique opportunity of admission behind the official scenes.

PRECEDENTS

A. I. R. 1926 *All.* 690.

Privy Council—Every word in Privy Council judgment should be valued.

The judgment of their Lordships of the Privy Council is a final pronouncement in which every word must receive its full value.

LAW REPORTING RULES

Mad. L. Journal (*Vol.* 3, *page* 223) (1893).

Edited by V. Krishnaswamy Aiyar and P. R. Sundara Aiyar, afterwards High Court Judges, Madras ; and P. S. Sivaswamy Aiyar, ex-Advocate-General and Executive Councillor.

The present system (of reporting) makes it possible to shake the authority of decisions by referring to the various reasons given by different Judges for arriving at the same result. When J. Cresswell's two brethren pronounced opposite opinions Cresswell said he agreed with his brother A for the reasons stated by his brother B. That was brilliant, but not satisfying to the public who want to know the settled law. Judges can always talk during argument, and it is unnecessary that they should also talk at advisings. Lord Jeffrey suggested a form of interlocutor for the first Lord Moncreiff, "parties' procurators having heard the Lord Ordinary ;" and this seems the proper safety valve for judicial loquacity, which, if sufficiently brilliant, may often be reported in the daily papers. Besides, have not the litigants some vested right in the spoken word which was immediately followed by an enforceable decree? Is it permissible that a Judge, who has delivered in open Court a weak and inconclusive speech, should privately recall that speech when an appeal is entered to the House of Lords, and practically reconsider the reasons for his opinion ? Lecturers and politicians are no doubt entitled to edit their compositions with a view to literary effect. It is otherwise with the acts of a Judge discharging a public duty. But are the reporters also not, to some extent, to blame ? The form of the report, apart from the judgment, is sometimes open to serious criticism.

NOTES AND COMMENTS

Presidents of Legislatures

After the Reforms, in the Legislatures of India central and provincial, the presidential chair is generally occupied by the President duly ordinarily elected. We are also familiar with the office of Deputy President. In addition to the President and the Deputy President by way of additional precaution there is a panel of Chairmen elected from among the members of the Legislature to occupy the chair temporarily. Very often we hear of Deputy Presidents and persons who are on the panel of Chairmen occupying the presidential chair for short or long durations. As far as possible the President should not leave the presidential chair while the proceedings are going on. The following observations on the parliamentary practice in England extracted from the English "Law Times" will be of general interest to our readers.

For 500 years the only officer entrusted by the House of Commons with the conduct of its business was its elected chairman, the Speaker' This is no longer the case: but even at the present time there is but one President. The Speaker is the only regular chairman over the deliberations of the House, and its sole representative to the outer world. The other officers who under certain circumstances take his place in the chair possess only an authority derived from him, and exercisible in the event of his inability to act. They are strictly vice-presidents, and do not form with him a presidential college. A vacancy in the Speakership created by resignation or death renders the House of Commons incapable of action till a new Speaker has been elected. Till 1853 there was no provision for a deputy of the Speaker. If the Speaker were ill or otherwise unavoidably kept out of the way, the only thing to be done was to adjourn the House or Committee, or in the case of prolonged absence of the Speaker, to accept his resignation and elect a successor. It is one of the curiosities of the House of Commons that this state of things should be borne without leading to any serious inconvenience. The Select Committee on the office of Speaker, appointed in 1853, reported that from 1613 till 1660 the Speaker was absent only on nine occasions; of those five were for an hour or two only: between 1660 and 1668 there were only two absences: from 1688 till 1760 only six, from 1770 till 1853, only nine cases, all of short absences. The Committee, however, remarked that it was notorious that occasionally, out of consideration for the Speaker members had purposely abstained from making a House, or had allowed it to be adjourned almost as soon as made. The Committee and the House agreed with them in their opinion, and expressed the most decided opinion that the actual power of a Speaker should, in the last resort, reside in one man only. "The confidence and respect", says the report, "paid to one man elected by the House for this office cannot be expected to attach easily to another who may be his substitute for a few days. Your committee would therefore regard with apprehension any plan which might lead to the frequent absence of the Speaker."

American Bar Association

It is reported that nearly 3,000 lawyers attended the annual meeting of the American Bar Association held last July. Referring to the proceedings the Law Journal writes:

Mr. James M. Beck, who three years ago was made an English Barrister (and an honorary Bencher of Gray's Inn) in order to argue a case between the United States and Canada before the Privy Council delivered an address on the future of democracy, which comes at a very apt time when Parliamentary institutions throughout Europe are under so heavy a cloud. Mr. D. Campbell Lee, who is a member of both the English and New York Bars, read a paper explaining the salient points of the recent changes in the English law of property. Dealing with the abolition of the law of primogeniture, he made the point, which was considered by the framers of Lord Birkenhead's Act to justify the change, that an examination of a large number of modern wills showed the rule of inheritance of land by the eldest son not to be the rule which most people adopted when they made their wills. It was seldom done in fact, in the case of estates of moderate size. He also said: "The English will not hereafter use that effete expression 'Indenture' in documents of conveyance. Each deed will be called by the name by which it is known in practice, mortgage, trust, and so on.

Are the Bar Associations in India coming anywhere near the level of the American Bar Association? Very often our annual meetings are a mere farce. Well attended and well conducted annual meetings do create an esprit de corps in the bar; and a united bar thinking and fighting for its rights as well as its duties will command greater respect at the hands of the Bench and the public. There is no use in our agitating for an autonomous unified Indian Bar unless at the same time we agitate also for the Bar Associations in this country being federated into a Central Bar Association meeting at least occasionally to consider the general interests of the Indian Bar.

Articles

Is an insolvent judgment-debtor liable to be arrested in the absence of a protection-order under the Provincial Insolvency Act of 1920?

(By P. V. Aghoram Iyer)

This question has often come up before the moffusil Courts for consideration. In the absence of an authoritative High Court ruling on the point the Courts have had to decide the question as a mere matter of interpretation of the relevant sections of the Insolvency Act.

A comparison of the Act of 1907 and the Act of 1920 is very necessary to throw light on this difficulty. The relevant section is S. 16 of the old Act corresponding to S. 28 of the present Act. The Section that has been added to the present Act is S. 31 relating to protection orders. Under the old Act an insolvent judgment-debtor enjoyed an automatic protection from arrest as a legal consequence of his adjudication. Nothing more than his adjudication was necessary to entitle him to immunity from arrest. S. 16 is clear on the point. "The debtor if in prison shall be released." These words have been deliberately omitted from the present Act. The effect of such omission is the abolition of this automatic protection that was enjoyed by insolvent judgment-debtors. Both these conditions have a rational basis behind them. The policy of the Act of 1907 was to secure the personal freedom of insolvents ordinarily to facilitate the proper administration by the receiver of the Bankrupt's estate; if the bankrupt was not free, and if he was liable to be harassed by execution creditors, he would be of no use to the receiver in the administration of the estate and the loss must fall on the creditors. However good the intention may have been this policy resulted in real hardship to creditors. Under cover of this clause every fraudulent insolvent went scot-free; so long as his person was free, he did not care at all how his estate was administered. To all intents and purposes he may commit acts of bad faith and there is no machinery in the insolvency law to punish him. Coupled with this, was the circumstance that under the old Act it was not obligatory upon the insolvent to apply for his discharge. The non-discharge of the insolvent was not visited, as now, with any penalties like annulment of adjudication etc., The clause then set a high premium on fraud. Many insolvents found in insolvency their refuge.

The omission of this clause from S. 28 of the present Insolvency Act was necessitated by these evil tendencies. The present Act therefore threw the burden of securing the freedom of person upon the insolvent (vide S. 31 of the Act.) It does not make even the grant of an order of protection a matter of course. That is a point of distinction between this Act and the Presidency Towns Insolvency Act of 1909. Under the Presidency Towns Insolvency Act of 1909, the grant of a protection order is a matter of course. Vide S. 25. It is not hedged round with the restrictions which exist in the Act of 1920. That implies that the person of an insolvent is now not ordinarily free from arrest. One other distinction may be noticed here. In the Act of 1907 in Cl. (2) of S. 16 there occurred the words "no creditor shall have any remedy against the person or property of the insolvent except with the leave of the insolvency Court." The leave of the insolvency Court as a condition precedent to exercising the remedy against the person follows as a corollary from the clause securing the freedom from arrest of the insolvent. But in the Act of 1920 the word "person" has been omitted from S. 28. This omission follows as a corollary from the omission of the clause relating to the automatic protection from arrest. If the insolvent is in prison to-day at the time of adjudication he must continue to be there in the absence of a protection order.

From the foregoing position it seems to follow that an execution creditor does not require the leave of the insolvency Court to arrest the insolvent judgment-debtor whose freedom from arrest is not sanctioned by a protection order. It is suggested that the term "or continue other legal proceedings" in S. 28 means a proceeding in execution asking for arrest. But this construction is not quite correct as in doing so we would

be imputing to the Legislature the folly of using redundant expressions in the former Act, for in S. 16 in the old Act both the words "person" and "continue other legal proceedings" were present. Both could not have been used to convey the same sense. The addition of a clause at the commencement of S. 28 is also significant. It says "The insolvent shall aid to the utmost the receiver in the administration of the estate and the funds being made available for creditors." This positive duty is laid on the insolvent; he is asked to free himself from arrest by virtue of a protection order; a time is fixed for his discharge and the penalty for his not getting his discharge is the annulment of adjudication. All this goes to show that even though the properties vest in the receiver the insolvent's person is not free in the absence of a protection order. It is suggested that the omission of the word "person" makes no difference and that the position laid down above can hardly have been the intention of the Legislature, because in giving effect to it, no administration in bankruptcy would be possible. Every execution creditor, it is said, would try to gain a private advantage by arresting the insolvent, and if possible by compelling his relations to pay him his whole money. The Legislature in desiring to put an end to automatic protection could hardly have intended to make the field clear and free for every execution creditor to resort to drastic mode of execution of the decree as though no adjudication had taken place. It is next asked: supposing he could be arrested without the leave of the insolvency Court, who is to have the benefit of any money that may be realised by arrest? The execution creditor or the receiver on behalf of the creditors? The question is not free from difficulty and no clear answer can be made. The cases in *Easwara Iyer* v. *Gobinda Rajulu Naidu* (1) and *Thakur Din* v. *J. Dubey* (2) would not seem to be on all fours with this case which comes under the Provincial Insolvency Act. There is some difference in the languages of the two enactments. If the insolvency Court has to give leave to arrest the insolvent judgment-debtor it need not in the same breath give protection to the insolvent; protection then is merely superfluous. If when the leave is asked for, the insolvent can satisfy the Court as to his bona fides and as to the necessity for his remaining free to aid the receiver in the administration of the estate, the leave will be refused in 9 cases out of 10. In an application for protection by the insolvent the same matters will have to be considered. There seems to be no point therefore in making it obligatory on the insolvent to obtain protection by proof of his bona fides. There are random observations in one or two judgments of the Madras High Court and in one case of the Oudh Commissioner's Court; but there has been no full discussion or elucidation of the doctrine. The matter is, therefore, not free from doubt.

(1) [1915] 39 Mad. 689.
(2) [1920] 12 Bur. L. T. 218.

Is it correct to say that the capacity to exercise a conditional power of disposal over the whole property of an undivided Hindu family governed by the law of the Mitakshara vests in the assignee in insolvency of the father of such family?

(By K. L. Venkat Ram, Bar-at-law, Madura)

A conditional power is not capable of delegation. For this principle see Farwell on Powers in the Chapter on Delegation of Powers, and Halsbury's Laws of England, Volume 23, pages 15-16, and Strahan on Law of Property in the chapter on Future Property. Further it is not correct to say that under S. 52 (2) (b) of the Presidency Towns Insolvency Act the capacity to exercise all powers of the insolvent vests in the assignee; for that section is limited to such of the powers as are contemplated by S. 2 of the same Act and that S. 2 contemplates unconditional power has been decided by the Privy Council in *Sat Narain* v. *Behari Lal*, A. I. R. 1925 P. C. 18 at page 26=6 Lahore 1 at 22.

Again it is to be noted that in view of S. 61 (5) of the Provincial Insolvency Act and the corresponding S. 49 (5) of the Presidency Towns Insolvency Act enacting that the assignee in insolvency shall distribute dividends among the creditors without preference, it must be held that it is not the intention of the

Legislature that the assignee in insolvency should exercise a power which involves a discrimination between debts as debts not illegal and immoral and debts illegal and immoral. And really there is no anomaly in this conclusion ; for the Hindu father's conditional power is based upon sons' pious obligation to discharge their father's debts which, as has been repeatedly pointed out by the Privy Council in several cases since *Sahu Ram's* case, is enforced by law under certain circumstances which, as has again now been pointed out by the Privy Council in *Sat Narain's* case in A. I. R. 1925 P. C. 18 at pages 19 and 22, ought not to be allowed to influence judgment while construing the Insolvency Act, a special enactment. Further it may be observed that in every Insolvency Act the powers that can be exercised by the assignee are limited to such of the powers that can be exercised by the insolvent for his own benefit, and there is absolutely no scope for contemplating any shadow of a condition in the words used in the Insolvency Acts, not even a condition, as in the case of a Hindu father's conditional power, that there should be debts, not to speak of the condition that such debts should be not illegal or immoral and other conditions. So absolute must be the power of the insolvent that can be exercised by the assignee.

In this connexion it will be useful to note that legally it is not correct to say that the share i. e., the undivided interest of the insolvent in the property owned by an undivided Hindu family of which he is a member vests in the assignee in his insolvency. It is not property but a mere possibility according to S. 6 of the Transfer of Property Act. It is not a vested interest but an interest defeasible on death . see 17 Madras 316 at pages 326-327. An interest defeasible on death is no vested interest according to S. 19 of the Transfer of Property Act. The Privy Council decision in *Sat Narain's* case in I. L. R., 6, Lahore 1, does not warrant the proposition that an undivided interest, even of the insolvent, vests in the assignee. On the other hand, that a member of an undivided Hindu family governed by the law of the Mitakshara has no specific or definite share in its property is at the foundation of the judgment of the Privy Council in A. I. R. 1925 P. C. 18 at page 19. It is worthy of note that the Privy Council has observed in A. I. R. 1925 P. C. 18 at page 20 that the power to obtain partition that a member has in relation to the property of the family is a power that can be exercised by the assignee under S. 52 (2) (b) of the Presidency Towns Insolvency Act. It is an unconditional power. It must be noted that the absence of a corresponding section in the Provincial Insolvency Act is of no legal consequence in view of its S. 28 (2) and the general law of powers permitting the capacity to exercise an unconditional power like a power to obtain partition being deemed to be an item of the property of the insolvent. For this see Strahan on Law of Property and Farwell on Powers cited above.

S. 2 of the Provincial and of the Presidency Towns Insolvency Acts really enacts a limit viz., that powers that can be included in "property" are only such as are unconditional powers, and to contend that S. 2 is not exhaustive of powers that can be included in "property," but can include a conditional power like a Hindu father's power of disposal of the whole property is repugnant to the subject viz., "Delegation of Powers" in that such contention is opposed to the well-established principle of the law of powers that a conditional power is not capable of delegation and is also repugnant to the context in that such contention is opposed to Ss. 61 (5) and 49 (5) of the Provincial and the Presidency Towns Insolvency Acts respectively which prohibit discrimination between debts as debts not illegal and immoral and debts illegal and immoral. Ss. 4 and 7 of the Provincial and the Presidency Towns Insolvency Acts respectively are subject to the provisions of the respective Acts one of which is Ss. 61 (5) and 49 (5) respectively which expressly negative discrimination between debts and, therefore, the said Ss. 4 and 7 are of no consequence on the question under discussion. It may be noted in passing that S. 4, sub-S. 2, of the Provincial Insolvency Act which declares finality of decision under sub-S. 1 of S. 4 is again subject to the provisions of the Act.

Finally it may be observed that the power to obtain partition in relation to joint property cannot be reached by the assignee in insolvency through S. 2 whereas it can be reached through S. 52 (2) (b) of the Presidency Towns Insol-

vency Act owing to the difference in their wording in this respect and that in this view S. 52 (2) (b) does not appear to be a surplusage. "In respect of," "capacity to exercise," "at the time of adjudication or at any time before discharge" which occur in S. 52 (2) (b) do not occur in S. 2.

It would, therefore, be correct not to assume that the father's share or undivided interest vests but to hold that the capacity to exercise power to obtain partition in relation to the properties of the family is capable of vesting under S. 52 (2) (b) of the Presidency Towns Insolvency Act or S. 28 (2) of the Provincial Insolvency Act rather than saying that a conditional power of disposal of the whole property vests under either of those sections or is capable of vesting according to law.

In this view the decisions reported in 40 Cal. 523 and A. I. R. 1925 Bom. 416 are correct, whereas the decisions reported in (F. B.), 51 M. L. J. 269 24 A. L. J 417 and 6 Lah. 493 cannot be upheld and require reconsideration.

Contempt of Court and Legal Men. S. 480, Criminal P. C.

(N. C. Hooza, B. A., LL. B., D. I. Khan, N. W. F. P.)

In Ss. 476 to 487, Criminal P. C. we find procedure to be adopted in cases of certain offences known as contempts.

"Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt or to lower his authority or to obstruct or interfere with the course of justice or the lawful process of the Court is a contempt of Court ": 33 B. 240.

Lord Chancellor Hardwick classifies it under three heads, one is *scandalizing the Court itself*, the other is *abusing parties concerned in cases before the Court* and the third is *prejudicing mankind against persons before the cause is heard.*

All these are either direct or indirect contempts. We here deal with the direct ones as contemplated by S. 480, Criminal P. C., which confers powers upon all Courts, civil, criminal or revenue, to punish a person guilty of committing any of the offences described in Ss. 175, 178, 179, 180, and 228, Indian Penal Code in its own view or presence. This power is being exercised uninterruptedly in this country since the assumption of administration by the East India Company. Courts of the Company exercised this power under Act 30 of 1841. It is of surpassing importance indeed that the Courts' dignity may be vindicated and their mandates enforced but it is of equal importance that they should not be made Judges in their own cause. No human being should be a complainant and a judge both is the first principle of law. History of this section furnishes many examples how frequently certain Courts have used it in an unjust, cruel, oppressive and highhanded way. Such arbitrary powers have as well brought monstrous injustice and atrocious injury to the innocent and respectable persons as slur on their own dignity. Here is given one example.

"There was no justification for compelling him to sit on bare floor in the Nazir's room, having his movements watched by a constable whilst answering the calls of nature, and having him held by the wrist in the Court during the course of proceedings. These were indignities no respectable person in the position of the accused should have had heaped upon him, merely because he had invoked the displeasure of the Court " A. I. R. 1925 Lah. 215.

This was a case of a pleader who was acquitted and found innocent. I remember a case of another innocent pleader being handcuffed under the veil of this section although the section does not allow such a course. Is it not a sorry spectacle to see a pleader himself handcuffed who goes in the Court to plead for putting off the handcuffs from the hands of his client, merely because the unduly sensitive Court feels insulted not knowing whether the insult was actually offered and intended? The very walls of the Court utter forth a groan at such an insult. All this is due to vast, arbitrary and unchecked powers given by this section. That every human being has a right of life and liberty which no power on earth can take away is the law of every land, but this section gives powers by which liberty of every person

is at risk. It is an anomaly that should never exist in any civilized country. Law is severe enough in its nature and mild hands of peaceful legislation should make changes in it if not for all, for pleaders at least, because they have always in the presence of the Courts, to discharge their duty fearlessly. They should not be open and exposed to the oversensitive Courts who take offence over walking with creaking shoes even. Pleaders are officers and co-workers of the Courts in whom is also reposed a great confidence and esteem by the public and Courts should not have, therefore, chance of bringing them to degradation in their eye.

It is said that Bench and Bar are two sisters; as such, no sister should have opportunity of indulging in her feelings and preying upon her sister. For maintaining dignity and composure of the Court, if the behaviour of a pleader is rude, contumacious, interrupting and insulting, let him be sent to an uninterested Court for proper trial, which a very pick pocket claims, and if found guilty let him be duly punished. Let the Judge be an accuser but the accuser should not be the Judge.

Reviews

The Code of Civil Procedure by D. F. Mulla, M. A. LL. B., *ex-Judge, High Court, Bombay*, and now Advocate, *High Court, Bombay*. Over 1400 pages, published, by Messsers. N. M. Tripathi & Co., Bombay, 8th Edition, 1926, Price Rs. 22.

The Code of Civil Procedure by D. F. Mulla, ex-Judge of the High Court of Bombay, has now been overdue for some time and it speaks volumes for the industry and meticulous care of the learned author that nowhere is there a trace of hurried work.

The author has retained in this 8th edition references to the earlier Code of 1882. Thus practitioners can see at a glance how the present law has been evolved and can follow more clearly the decisions based on the old Code of Civil Procedure. The bock contains very full appendices including the Charters of the several High Courts and rules made thereunder.

Of the contents little need be said, for this work of all Mr. Mulla's works, and he has written several, is his *magnum opus*. The nótes to the sections are clear and concise and numerous cross-references make it easy for the busy practitioner to pursue a particular point with the minimum of effort. There are several new features in the present edition, conspicuous among them being an erudite note on the Attorneys' Lien which is treated of under O. 8, R. 6.

The learned author's method of treating each topic is an ingenious one. He appreciates that a law book should not be a catalogue of cases, but a commentary of cases. He does not merely enumerate every decision on a particular point, but he sifts the rulings and rejects all those which are no longer good law. He points out the *ratio decidendi* of the cases which he retains and deduces a general principle therefrom. In several instances this principle is further crystallized in the form of illustrations to the sections. All this must have entailed considerable labour, for the learned commentator has spared no efforts to make his book of all the Codes of Civil Procedure *facile princeps*. The author's deep learning has enabled him to be independent and outspoken where he felt a decision was wrong. To take one instance only: the decision in *Holkar* v. *Dadabhai* (1), a case decided under Cl. 12 of the Letters Patent, had been adversely criticized in the previous editions of this book. That criticism has been accepted in toto by the Bombay High Court which, after a lapse of 35 years, has overruled *Holkar* v. *Dadabhai* by a Full Bench judgment in the case of *Indian Spinning and Weaving Co.* v. *Climax Syndicate* (2).

A good index to a law book is perhaps its most important recommendation to a busy practitioner; for how many a legal publication is ruined by an inadequate index. Realizing this point the author was able to prevail upon Mr. Justice Fawcett of the Bombay High Court who has shown great acumen in recasting the index.

(1) [1890] 14 Bom. 353.
(2) A. I. R. 1926 Bom. 1=50 Bom. 1 (F. B.).

The bringing of the case-law in the authorised and unauthorised series down to the end of 1925 and the incorporation of references to Indian Cases and the All India Reporter in pursuance to the desire of a large number of legal practitioners are some of the remarkable features of this edition, the need of which was somewhat keenly felt during the last few years.

The *format* of the book is all that can be desired. Though several pages have been added the Times Press have been able to reduce the book to a size smaller than the previous edition. We have nothing but praise for the new edition, the contents of which as compared with its exceedingly modest price assure it a wide circulation.

A Digest of Privy Council Rulings 1913 to 1925 *by Mr. P. Hari Rao, B.A. B. L. Vakil, High Court, Madras and published by Messrs. Law Printing House, Madras, July* 1926, *over* 600 *pages. Price Rs.* 10.

This is the companion volume to the third edition of the well-known Digest of Privy Council Rulings by the late Mr. T. V. Sanjiva Rao. This incorporates the law between the years 1913 and 1925. A digest of the pronouncements of the highest judicial authority is an indispensable necessity for every lawyer in India; for no lawyer can feel his ground safe unless and until he is sure what their Lordships of the Privy Council have said in the matter. The Law Printing House has also published a supplement of Notes containing references to cases between 1913 and 1925 wherein the Privy Council rulings prior to 1912 have been judicially noticed, thus bringing the case-law down to the end of 1925.

Ajmere-Merwara Law Journal—Edited by Radhey Lal Jayaswal, B.A. LL.B. Vakil High High Court: Subscription Rs. 8 per year.

We welcome this monthly journal which has been found necessary in the province of Ajmere-Merwara for giving publicity to the judicial grievances of the people. The other objects of the journal are: (1) the reporting of all the important, civil and criminal cases, determined by the Judicial Commissioner of Ajmere-Merwara and the decisions of the Judicial committee of the Privy Council on appeal from the Court of the Judicial Commissioner of Ajmere-Merwara (2) finding scope for contributors from all the parts of India for development of their legal acumen. Notwithstanding the existence of a number of journals in the other provinces, the necessity of a journal for Ajmere Merwara must undoubtedly have been felt by the members of the Bench and the Bar and the litigant public in that province. The journal section of this monthly is interesting. We wish the Journal a useful and long career.

The Agra Tenancy Act (III of 1926.) With Notes, Up-to-date Case-law and Comparative Tables, by Mr. Baij Nath Sahai, B. A., LL. B., *Vakil, High Court, Allahabad.* 1926 Edition Pages over 275. Price Rs. 3.

The importance of a commentary on the new Agra Tenancy Act, 1926 which repeals the old Act of 1901 can be realized when it is remembered that nearly 100 sections are quite new in the Act which has already come into force from 7th of September 1926. The Comparative Tables explaining the corresponding sections of the two Acts and the important changes in the Act which are indicated by the author will serve a very useful purpose. The rulings up to June 1926 have been incorporated.

THE
ALL INDIA REPORTER

PRECEDENTS

A. I. R. 1925 *Oudh*. 94 (*a*).

Practice—Precedents—Obiter dictum of Privy Council, where they are a review of principles and authorities, are binding.

Where their Lordships of the Privy Council have distinctly summed up propositions, as a result of review of principles they cannot be treated as obiter dictum though the points did not arise in the case and the Subordinate Courts are bound by them because the Privy Council intended them to be binding on all Subordinate Courts.

LAW REPORTING RULES

Mad. L. Journal (*Vol.* 8, *page* 456 (1898).

Edited by V. Krishnaswamy Aiyar and P. R. Sundara Aiyar, afterwards High Court Judges, Madras ; and P. S. Sivasawmy Aiyar, ex-Advocate-General and Executive Councillor.

The utlity of seting out the full text of the reference by a lower Court to the High Court is generally doubtful; but surely there can be no doubt of the absurdity of so doing in a case in which the High Court decided that the lower Court had no power to make the reference at all : cf 25 *Cal.* 488 ; 896. This is paralleled by the case in the Madras Reports cited above: cf. 21 Mad. 476 *pp.* 478-479, which sets out a preliminary order of a Divisional Court remitting the case to the lower Court for findings of fact, occupying about three-fourths of a page, and also the order of reference to the Full Bench occupying about a page and a quarter ; the former order is of course, wholly irrelevant, and the latter is really *obiter dictum* and contains a view of a previous case different from that taken by the Full Bench. *It is also surely unnecessary to state that the Divisional Court passed a decree in accordance with the judgment of the Full Bench* ; if it did not, there would indeed be a case worthy of report. The statement that this purely formal procedure was duly followed, is, however, repeated in the reports *ad nauseam*

GUARDIAN OF THE PERSON.

SEC. 25 OF ACT VIII OF 1890.

By E. S. Sunda B. A., B. L., Vakil, Madura.

NOW that the Indian Legislative Assembly is very forward in its "legislative" activities, I would be permitted to place before them certain apparent inconsistencies obtainable in the Guardians and Wards Act.

Section 25 of the Act, if literally understood without the aid of judicial interpretations, would state :

(1) it applies only to the cases of those guardians who had the custody of the minor once ;

(2) it does not apply to cases where guardians never had the custody of the minor ; and,

(3) the Court should be of opinion that the return of the minor to the guardian should be in the interests of the former.

I. But S. 25 has been held to apply to cases even where the guardians did not have the custody of the minor at any time : *Utma Kuar* v. *Bhagwanta Kuar* (1). In Madras also Sadasiva Iyer, J., holds in *Ibrahim Nachi* v. *Ibrahim Sahib* (2) that S. 25 provides for cases of the type. Venkatasubba Rao, J., says in one of his judgments

> Although the lawful guardian did not have previously actual possession and physical custody of the minor, it should be deemed that the minor at the time of leaving or removal was constructively in that guardian's custody and therefore he could enforce his rights therein under the section.

Jackson, J., states :

> A ward who was never in the actual custody or charge of his father may be *deemed* to be removed from custody when the person in actual possession repudiates to the father's knowledge the right of the father to the actual custody of the minor.

In *Bai Tara* v. *Mohanlal Lallubai* (3) the Bombay High Court also takes the view that a return of the child can be ordered under the section.

According to the previous decisions the view was :

(1) there should be proof of the previous custody of the minor with the petitioning guardian ;

(2) and that the minor *left* or *was removed* : see words of S. 25.

If these two facts could not be proved, the remedy, to get back the custody of the minor, the Courts held, could not be had under S. 25 of the Act and a separate suit with a prayer for the custody of the child was stated to be the only means available. When now the views of the High Court regarding the implications of S. 25 of the Act change, it is better that the Legislature in an explanation to the section states specifically that it applies to these cases also and a suit is not necessary.

II. Regarding the third point : On whom does the burden of proof lie ? (a) Is it for the petitioning guardian to prove that the return will be for the interests of the minor ? (b) Does the fact of the petitioning guardian being the *father* of the child (minor) make any difference and shift the onus on the respondent who has the present custody of the child ? (c) Should the present custody of the minor be disturbed only after clear proof of the allegations against the present guardian ?

These three questions will be best disposed of if the one question of onus is settled. Several Courts seem to take the view that under S. 25, the respondent in a petition, i. e., the *present* guardian of the minor should prove the unfitness of the father to be the guardian —if the father is the petitioner—and on his failure the minor shall be ordered to be restored to the custody of the father. This view they take with a vague statement that according to law, the father is the best guardian ; and before anybody else is allowed to step into his place the former's unfitness should be proved. Of course they make a distinction between cases where parties happen to be parents and cases where parties are relations of the minor, parents excepted.

As to the shifting of the onus on the *present* guardians of the ward, to prove the unfitness of the father, when the latter happens to be the petitioner under S. 25 one cannot say whether such a view is very sound for the following reasons :

(a) Distinction should be made between petitions under S. 19 and those Act. S. 25 of the Guardians and Wards

(1) [1915] 37 All. 515=29 I. C. 416=13 A. L. J. 742.

(2) [1916] 39 Mad. 608=33 I. C. 894=30 M. L. J. 21.

(3) A. I. R. 1922 Bom. 4

under a petition for the appointment of the petitioner as guardian is put in —when the father is living—it is natural and legal that the Court should insist on the petitioner showing the unfitness of the father to have the custody of the child. But in cases under S. 25 the petitioner may happen to be the father and the section has nothing to do with the removal or appointment of guardians. Its scope is limited to the ordering of change of custody of wards.

(b) Section 25 itself specifically states *affirmatively that if it* (*the Court*) *is of opinion that it will be for the* welfare of the ward to return to the custody of his guardian is may make an order ..... Naturally according to rules of evidence, the petitioner should prove that the *return* will be good for the minor, else he fails in the petition. The person who wants the ward should prove that the present custody is bad and his custody would be better. When the section is so unequivocal in its import, it is strange that the onus sometimes is shifted to the side of the respondents.

(c) Except under S. 19 only, which provides that the unfitness of the father should be proved before anybody else is appointed guardian, there is no provision of law in the Guardians and Wards Act or in the Hindu Law which sets such a high premium on the right of a father *at all times and in all circumstances.* It might be that *the Court may have in view* the fact that the father is generally the best guardian in passing any order under S. 25 but to impose a duty on the respondent (who had taken pains to look to the welfare of the boy till his good father got his sense to claim him !) the duty of proving the unfitness is something abnormal,immoral and even against the legal necessities according to the rules of Evidence. The question then rises whether a Hindu father is indisputably the guardian of the ward at all times and under all circumstances: Sundara Iyer and Spencer JJ. say in *Batcha Chetty* v. *Ponnuswamy Chetty* (4)

Recent decisions of the High Court have established the principle that in an application of the kind in question, the welfare of the child is the paramount consideration although regard must also be had to the recognized rights of guardianship under the Hindu Law. (A similar statement appeared in the unreported case though published in papers of Subadar claiming back his two children from the custody of their maternal uncles recently decided by a Full Bench of the Madras High Court.) As a matter of fact the texts of the Hindu Law do not recognize any absolute rights of guardianship —any one, the soverign being entrustedwith the guardianship of all minors and entitled to appoint any person guardian in their interests.

(Statements within brackets—mine).

(d) That the view of some of the judges that a return shall be ordered in cases where the unfitness is not proved is not after all sound can be seen from this instance:— A is an excellent father. B, the maternal uncle of the ward is now his present guardian. Nobody has anything to state against A, but the return of C, the ward to his father will surely interfere with his material prospects-education, culture and wealth. Should the Court under such circumstances order the return of the ward or no? So in certain circumstances, there is no unfitness at all and no unfitness can be proved. Still if the Court, believes and gives a finding that the present custody of the boy will be for his future interests under S. 25, the Court is bound to refuse the order for return of the ward.

(e) That the Hindu Law and the Guardian and Wards Act, do not recognise any absolute rights of guardianship is seen also from the deliberate drafting of S. 25 —"the Courtmay make an order for his return." Sundara Iyer and Spencer JJ, in the same 22 M. L. J. case say the application (under S. 25) is one which the Court is not bound to grant unless it is satisfied that it is for the welfare of the child that an order should be made.

(f) This takes us to the view that the Courts have and claim the right very rightly to interfere in domestic relationship in the cases of wards when their present custody is good for their future. The Court cannot afford to be sentimental or allow itself to be hoodwinked by indifferent fathers who make a claim for the return of the ward as and when they choose.

(g) An order stating that the present custody will be better than the father's custody, that the boy will be materially better with his maternal uncle than with his father and yet ordering the return of the ward to the father as no unfitness has been proved, appears prima facie inconsistent. When S. 25 does not talk of the unfitness of the father at all still the confusion with S. 19 is often observable in many of the judgments.

4) [1912] 22 M. L. J. 68=13 I. C. 16=(1911) 2 M. W. N. 561.

So it would be better if it is stated in the enactment itself, something regarding the superior position of the father as distinguished from others if it is necessary at all. That would avoid the incalculable hardship in several cases experienced in arguing the question of burden of proof. It is high time that the Legislature states clearly the implication in S. 25. That such a legislative definite interference is necessary is seen from the emphatic statements of Macleod, C. J. and Shah J. as follows in *Bai Tara* v. *Mohanlal* (3).

Sir Norman Macleod :—

Section 19 has nothing whatever to do with the case. We have nothing to do with the question whether the father is unfit to be the guardian of the person of the minor. That would be only at issue if there was an application by another person to have a guardian appointed other than the father.

It is really a question what is the proper time for the father to make an application to the Court to obtain the custody of the child and that question must depend entirely upon the further question when will it be for the interest and welfare of the minor to return to the custody of his father.

Justice Shah after quoting from *Annie Beasant* v. *Narayaniah* states:—

the only question is whether it is for the welfare of the minor that the existing custody of the mother should be disturbed.

So a clear and a definite statement regarding the onus should be made in the Act itself whether the petitioner is a father or no.

III. The other question remains:—"Should the present custody of the minor be disturbed only after clear proof of the allegations against the present guardian" In *Sarnt Chandra* v. *Girindra Chandra* (5) it was held that there should be clear allegations in the petition that the present custody of the minor is bad and that the application is made for his good and that Court should be satisfied of the latter. Mala fides in the petitioner, however good his claims to have the custody may be, should not be allowed to have their play.

These questions very often arise in Courts and very often different interpretations are given. It is not strange that such a state should prevail when the High Courts differ and when the cases under S. 25 are small in number. Whatever it is, it should be clearly stated that S 19 should not be connected and confused with S. 25 of the Guardians and Wards Act.

(5) [1910] 15 C.W.N. 457=7 I.C. 702.

CORRESPONDENCE

Jurisdiction in Civil and Revenue Courts.

THE EDITOR, "ALL INDIA REPORTER"

Dear Sir,

I shall be much obliged if you kindly publish the following note in your valuable Journal.

In *I. L. R.*, 44 *All*, 686=*A. I. R.* 1922 *All.* 424 it is ruled that where a Court of Reveuue finds that on the fact stated in a plaint presented to it no case is disclosed triable by such a Court, it should not merely dimiss the suit but should order the plaint to be returned to the plaintiff for presentation in the proper Court. This ratio decidendi of this ruling, which is clear, is the same as that of an unreported ruling of Patna High Court (*Mt. Jegaswar Koer* vs. *Tilakdhari Singh*) in Misc. Appeal No. 243 of 1922 which is a case from Ranchi. It was a suit for ejectment. The plaintiff's case was that the defendant's lease of three years having expired, the latter were trespassers and therefore could be ejected. Their Lordships (Sir Dawson-Miller, C. J., and Foster, J.) made the following observation. "The suit as framed was one to eject trespassers, but on the facts found, the defendants were not trespassers but non-occupancy raiyats. As no suit to eject non-occupancy raiyats could be tried in the civil Court, the question of the plaintiff's right against them could not be determined in the present suit. The learned Subordinate Judge should have contented himself with dismissing the suit. He ordered the plaint to be returned for presentation in the proper Court. This could not be done as the suit was not one for the ejectment of raiyats."

In the very recent ruling of *Madhab* vs. *Lall Singh*, *A. I. R.* 1926 *Patna* 403, the plaintiff sought to eject the defendants from the lands asserting that he was an occupancy raiyat and the defendant was an underraiyat under him. The suit was decreed by the munsif of Manbhum and the decree was upheld by the District Judge of the same district. Their Lordships (Adami and Dass, JJ.) ruled that this suit could not be brought in the civil Court under the terms of S. 139 A of the Chota Nagpur Tenancy Act and hence the decree of the lower Courts was set aside. So far as the decree was set aside, the reasoning is intelligible, if I may say so, with the greatest respect. It is however, difficult to follow why the plaint was not returned for presentation in the proper Court, i. e., the Revenue Court. Can it be said that the ruling is not correctly decided? If so, the principle may, further, he discussed in the columns of your valuable journal by your learned readers.

Yours sincerely,

KHETTRANATH SINGH,

Munsif, PALAMAU.

END

THE

ALL INDIA REPORTER

1926

PRIVY COUNCIL SECTION

CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF THE PRIVY COUNCIL REPORTED IN

(1) L. R. 53 INDIAN APPEALS AND

ALL THE JOURNALS PUBLISHED IN INDIA AND BURMA

WITH

EXTRA JUDGMENTS

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1926

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TO

THE LEGAL PROFESSION

IN GRATEFUL RECOGNITION OF

THEIR WARM APPRECIATION AND SUPPORT

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COMPARATIVE TABLES

(PARALLEL REFERENCES)

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Table No. I.—This Table shows serially the pages of LAW REPORTS INDIAN APPEALS for the year 1926 with corresponding references of the ALL INDIA REPORTER.

Table No. II.—This Table shows serially the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1926 with corresponding references of the ALL INDIA REPORTER.

Table No. III.—This Table is the converse of the **First** and **Second Tables.** It shows serially the pages of the ALL INDIA REPORTER with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

Showing Seriatim the pages of LAW REPORTS, INDIAN APPEALS for the year 1926 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of L. R. 53 INDIAN APPEALS
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

L. R. 53 Indian Appeals=All India Reporter.

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N. B.—Column No. 1 denotes pages of other JOURNALS.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

All Non I.A. Journals.	A. I. R.	All Non I.A. Journals.	A. I. R.	All Non I.A. Jonrnals.	A. I. R.	All Non I.A. Journals.	A. I. R.	All Non I.A. Journals.	A. I. R.

Please refer to Comparative Table No. II in the Courts to which the Journals belong.

TABLE No. III

Showing seriatim the pages of the ALL INDIA REPORTER, 1926 PRIVY COUNCIL Section with corresponding references of other REPORTS, JOURNALS AND PERIODICALS including the INDIAN LAW REPORTS and LAW REPORTS, INDIAN APPEALS

N. B.--Column No. 1 denotes pages of the ALL INDIA REPORTER, 1926 PRIVY COUNCIL.

Column No. 2 denotes corresponding references of other REPORTS, JOURNALS and PERIODICALS.

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	23	M L W 172		30	C W N 844		1926	M W N 482		96	I C 20			
	1926	M W N 145	27	50	M L J 498		43	C L J 521		44	C L J 53			
	24	A L J 248		1926	M W N 382		30	C W N 866		24	M L W 309			
	50	M L J 629		3	O W N 453		51	M L J 42		28	B L R 1143			
	94	I C 782		94	I C 331		29	O C 163		50	Bom 604			
2	53	I A 11		28	B L R 873		7	P L T 591		31	C W N 128			
	24	A L J 250		43	C L J 430		1	Luck 215		51	M L J 577			
	43	C L J 259		24	M L W 18	52	24	A L J 655	77	24	A L J 758			
	50	M L J 332		30	C W N 841		28	B L R 917		96	I C 142			
	1926	M W N 332	29	94	I C 916		43	C L J 465		4	Rang 518			
	7	P L T 223		1926	M W N 489		51	M L J 6		31	C W N 252			
	5	Pat 290		3	O W N 735	54	24	A L J 609		3	O W N 845			
	28	B L R 841		4	Rang 513		28	B L R 910	79	53	I A 164			
	94	I C 830	31	5	Pat 461		48	All 313		7	P L T 553			
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	1926	M W N 203		24	M L W 84		51	M L J 52		31	C W N 74			
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	53	I A 24		30	C W N 938		3	O W N 581		44	C L J 86			
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	43	C L J 249		1926	M W N 493		28	B L R 931		24	A L J 736			
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	93	I C 219		24	M L W 115		3	O W N 591	88	1926	M W N 592			
	50	M L J 631		53	I A 84		7	P L T 501		96	I C 887			
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18	53	I A 64		51	M L J 1		24	A L J 801		24	M L W 394			
	50	M L J 391		1926	M W N 499		24	M L W 58		6	Pat 24			
	49	Mad 249		50	Bom 360	68	24	A L J 622		28	B L R 1395			
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★★ A. I. R. 1926 Privy Council 1

(FROM ALLAHABAD)

1st December 1925.

LORDS SHAW AND PHILLIMORE, SIR JOHN EDGE, MR. AMEER ALI, AND LORD SALVESEN.

(Kunwar) Chiranjit Singh—Appellant.

v.

Har Swarup—Respondent.

Privy Council Appeal No. 80 of 1923, from Allahabad Appeal No. 44 of 1921.

★★ *Contract Act, S. 74—Contract broken by purchaser—Earnest money is forfeited.*

Earnest money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee. [P. 2 C. 1]

A. M. Dunne, K. C. and *B. Dube*—for Appellant.

L. De Gruyther and *J. M. Parikh*—for Respondent.

Lord Shaw.—The main appeal has reference to a contract of sale of the Markham Grant Estate belonging to the defendant Jyotish Sarup. The contract was entered into with the plaintiff-appellant. The High Court, reversing the judgment of the Subordinate Judge, held that there was a complete contract of sale. In the opinion of the Board the High Court, in this particular, as in the others aftermentioned, was right.

One of the terms of this contract of sale was as follows:

28th July 1914, from defendant to the plaintiff:

"Willing on old terms namely earnest twenty thousand balance in two moieties, first payable on executing conveyance, last within six months net cash we rece ve 4 laks 76,000."

On the 2nd August a reply was sent accepting the proposal.

From that point forward, however, the appellant appears to have encountered financial difficulties in carrying out the contract. He set about endeavouring to secure the property on modified and easier terms. He did not pay the earnest money *eo nomine*, but on the 28th August 1914, he sent two cheques, amounting *in cumulo* to Rs. 1,65,000, the receipt being granted for these sums "towards the sale price of the Markham Grant Estate out of the consideration of Rs. 4,76,000."

It is contended that this formed a supersession of the former contract. The Board agree with the opinion of the High Court that this is not so. It was merely a financial modification in the interests of the purchaser, who appeared to be unable or unwilling fully to meet the terms of the contract.

Then came, on 6th September 1914, a letter from the purchaser's representative in these terms:

In continuation of my telegram, dated the 3rd instant from Simla, I have to inform you that, owing to certain unavoidable circumstances Kunwar Chiranjit Singh of Kapurthala, is quite unable to purchase the Markham Grant in the Dehra Dun district. You are hence quite at liberty to settle your terms and make up the bargain with any other purchaser.

It is accordingly plain that the purchaser was unable or unwilling to complete the contract, even in its modified terms.

According to the judgment of the High Court, which again, in their Lordships' view, is correct, the purchaser must, having broken the contract, lose his earnest money of Rs. 20,000, but must be repaid Rs. 1,45,000, the balance of his

payment to account. The appeal is brought with the object of his also obtaining repayment of the earnest money.

In the opinion of the Board, as mentioned, the original contract of sale was not superseded. It was carried forward with the modifications alluded to, and in particular there is nothing to suggest that the owner of the estate agreed to sacrifice the stipulated earnest.

Earnest money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee.

The application of this principle to the contract in question settles the case.

A cross-appeal was presented truly for the purpose of endeavouring to meet circumstances which have not arisen, namely, the Board's possibly coming to an opinion that the original contract of sale had been wiped out.

Their Lordships will humbly advise His Majesty that the main appeal fails with costs. As to the cross-appeal there will be no order except that there be no costs to either side.

Appeal dismissed.

Solicitors for Appellant—H. Polak.

Solicitors for Respondant—T. L. Wilson & Co.

★★ A. I. R. 1926 Privy Council 2

(FROM PATNA A.I.R. 1923 Patna 492.)

2nd December 1925

LORDS SHAW AND PHILLIMORE, SIR JOHN EDGE AND MR. AMEER ALI.

(*Rao Bahadur*) *Man Singh*—Appellant.

v.

Maharani Nawlakhbati and *another*—Respondents.

Privy Council Appeal No. 95 of 1924.

★★ *Hindu Law—Widow—Surrender of estate in return for a fixed monthly allowance — Widow a ward of Court — Court's permission not obtained—Estate in Court's possession—Surrender is void—Bengal Court of Wards Act (B. C. 9 of 1879), S. 60.*

Where two co-widows who were wards of Court under Bengal Court of Wards Act (1879) and whose property was in Court's possession, surrendered their interest in their husband's estate without the sanction of Court of Wards to the nearest reversioners who in return agreed to pay a fixed monthly allowance to the widows for their lives,

Held: that the surrender was void under Hindu Law as well as in contravention of S. 60 of the Bengal Court of Wards Act: 46 *I. A.* 72 and 47 *I. A.* 233 *Ref.* [P 9 C 1]

L. D, Gruyther and *S. Hyam*—for Appellant.

G. R. Lowndes and *E. B. Raikes* — for Respondents.

Sir John Edge.—This is an appeal from a decree, dated the 6th April 1923, of the High Court at Patna, which affirmed a decree, dated the 5th June 1922, of the Additional Subordinate Judge of Bhagalpur.

The parties to the suit in which this appeal has arisen are Hindus, by caste Rajput, of the district of Bhagalpur, who are governed by the law of the Mitakshara, and the following pedigree shows how they are related (see page 3).

Sir Hariballab Narain Singh died intestate on the 1st April 1907, possessed of the Sonbarsa estate, which was situate principally in the district of Bhagalpur and produced an income of about two lacs of rupees a year. On his death his two widows, Maharani Tarabati and Maharani Nowlakhbati, succeeded him in the possession of the estate. On the 30th April 1907, the two widows who were pardanashin ladies, jointly presented to the Collector of Bhagalpur a petition in which they alleged that the estate was heavily involved in debt, that there were large arrears of income to be collected, and that they were unable to manage the estate, and asked that they should be held under S. 6 of the Court of Wards Act, 1879, to be disqualified proprietors, and should be declared by the Court of Wards incompetent to manage their own property and that the estate should be taken over by the Court of Wards. That application was forwarded by the Collector to the Court of Wards, and thereupon the Court of Wards under S. 27 of the Act made on the 27th May 1907, an order declaring that the widows were incompe-

tent to manage their own property and declaring that it was determined under S. 35 of the Act that the Court of Wards should take charge of the property of the widows and directed that possession of such property should be taken on behalf of the Court of Wards. Thereupon the widows became wards of the Court of Wards. The Court of Wards allowed to each of the widows Rs. 625 a month for her maintenance. On the death of Maharani Tarabati in 1920 the monthly allowance made by the Court of Wards to Maharani Nowlakhbati for her maintenance was increased to Rs. 1,250. The widows and the survivor of them continued to live in the family house of the Sonbarsa estate.

On the 18th December 1918, the widows, as parties of the first part, and Gobind Singh and Rudra Pratab Singh, as parties of the second part, made a deed, written in English, which, omitting the schedule, is so far as is material as follows :—

"(Sd.) Sri Maharani Teravati. By my own pen.

(Sd.) Sri Maharani Navalakhabati. By my own pen.

This Indenture made the eighteenth day of December of the Christian year One Thousand Nine Hundred and eighteen Between Maharani Tarabati and Maharani Nowlakhbati, the senior and the junior widow respectively of the late Maharaja Harballabh Narain Singh Bahadur, K. C. I.E., residing at Sonbarsa in Thana Sonbarsa, Pargana Nisankhpur Korha, District Bhagalpur, hereinafter called the First Party of the one part; and Rao Bahadur Govind Singh and Rudra Pratab Singh, sons of the late Rao Bahadur Takat Singh, and daughter's son of the said Maharaja Harballabh Narain Singh Bahadur K.C.I.E., residing at Barwara, in the Jeypore State, in Rajputana, hereinafter called the Second Party of the other part, whereas the late Maharaja Harballab Narain Singh Bahadur, K.C.I.E., died intestate on the 1st day of April 1907, leaving considerable property, moveable and immovable, commonly called the Sonbarsa Estate, mostly situate in Pargana Nisankhpur Kurha in the Sub-division of Madhipura, District Bhagalpur, and leaving behind him no male issue but only two widows, namely, the First Party and an only daughter namely Maharaja Kumari Padmabati, mother of the Second Party, and two daughter's sons by the said daughter, namely the Second Party and whereas on the death of the said Maharaja Bahadur the First Party succeeded to and came into possession of all property, moveable and immovable, left by him, with the rights of Hindu widows under the Benares School of Hindu Law, which governs the family of the said Maharaja Bahadur and whereas by reason of the First Party, being pardanashin ladies incapable of managing a big property like the Sonbarsa Estate, the Court of Wards has taken up the management of the said estate under the provisions of Act IX of 1879 (B. C.) on their behalf, and is at present managing the property through Rai Sahib Nilmoney Dey Manager appointed under the pro-

visions of the said Act and whereas the First Party are now getting a monthly allowance of Rs. 625 (rupees six hundred and twenty-five) each from the Court of Wards for their respective maintenance. And whereas the said Maharaj Kumari Padmabati died on the twentieth day of May 1915, and whereas the First Party are now growing old and are desirous of remaining aloof from the concerns of the world and of spending their latter days in Divine worship and meditation in the Holy City of Benares, with an allowance for their maintenance befitting their rank and position; and whereas for the reasons aforesaid the First Party wish to relinquish and surrender their Hindu Widows' estate in the said property left by the said Maharaja Bahadur, their deceased husband, to the next heirs, the Second Party who have undertaken to pay them or the survivor of them, out of the income and profits of the said estate left by the said Maharaja Bahadur the monthly sum of Rs. 2,000 (Rupees two thousand) for maintenance and also to defray the expenses of the daily and periodical worship of the family deities Lachhmi Narayan Jeo, Ram Chandra Jeo and Radha Krishan Jeo, at a cost of Rs. 100 (Rupees One hundred) per mensem. And whereas the Second Party have agreed to all the terms aforesaid.

Now this indenture witnesseth: 1. That the First Party Maharani Tarabati and Maharani Nowlakhbati do hereby relinquish and surrender all their rights in the property moveable and immovable, left by their husband, the late Maharaja Harballabh Narain Singh Bahadur, K.C.I.E., commonly called the Sonbarsa Estate, now in the charge and under the management of the Court of Wards to and in favour of the Second Party Rao Bahadur Gobind Singh and Rudra Pratab Singh, the next heirs of the said Maharaja Bahadur under the Hindu Law, and in pursuance thereof the First Party do hereby make over the entire property aforesaid to the Second Party in full extinction of their rights therein as Hindu widows.

2. That the Second Party will be entitled to the whole property aforesaid from this date and they will hold and enjoy the same in the rights of daughter's sons succeeding to the property of their maternal grandfather under the Benares School of Hindu Law, the share of each being a moiety of the said property.

3. That the Second Party will be entitled to have their names entered as proprietors in equal share in respect of the revenue-paying or revenue-free estates included in the said property by removing the names of the First Party now recorded in the registers maintained under Act VII of 1876 (B. C).

4. That the First Party will at once inform the Court of Wards of this surrender and request the Court to make over the charge and management of the said property to the Second Party subject to the Court's retaining the management if it thinks fit, under S. 13-A of the said Act IX of 1879 (B. C.).

5. That the first party, or the survivor of them, will be entitled to receive a maintenance allowance of Rs. 2,000 (Rupees two thousand) per mensem, from the Second Party out of the rents and profits of the said property so long as they or either of them live or lives.

6. That the Second Party undertake to keep up and maintain the daily and periodical worship of the family deities, Lachhmi Narayan Jeo, Ram Chandra Joo, and Radha Krishna Jeo, installed at the Sonbarsa House left by the said Maharaja Bahadur, at a cost of Rs. 100 (rupees one hundred) per mensem, and should they omit or neglect to carry out this undertaking the First Party will be entitled to inforce the fulfilment thereof.

In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above-written in the presence of :—

Witnesses.—(1) Bindhyeswari Prasad Singh, High Court Vakil, Monghyr.

(2) Ajodhya Prasad Choudhary, M. C., resident of Kassim Bazar, Monghyr.

Witness.—Prabhu Charan Ambasta, Bhikhanpur, Bhagalpur.

Witness.—Bindyeswari Prasad Singh Vakil, Monghyr.

" Anirudh P. Singh, Pleader and Zamindar, Panjwara, Bhagalpur.

" Ram Chandra Singh of Mohanpur, Bhagalpur.

" Ram Chandra Singh of Mauza Chakla Hanuman Nagar. By my own pen.

" Babu Nirbhay Narayan Singh of Bindwara, Pargana Monghyr. By my own pen."

The deed was registered on the 18th December 1918.

On the same day, 18th December 1918, Gobind Singh and Rudra Pratab Singh by their ekrarnama agreed in writing with the widows so far as is material as follows :—

"This agreement made on the 18th (eighteenth) day of December one thousand nine hundred and eighteen between Rao Bahadur Gobind Singh and Rudra Pratap Singh, alias Begai Singh, sons of the late Rao Bahadur Lakat Singh, and daughter's sons of the late Maharaja Harballab Narain Singh Bahadur, K.C.I.E., residing at Barwara in the Jaipur State, Rajaputana, hereinafter called the First Party of the one part and Maharani Tarabati and Maharani Nowlakhbati, the senior and the junior widows, respectively of the said Maharaja Hariballab Narain Singh Bahadur, K.C.I.E., residing at Sonbarsa, in Thana Sonbarsa, Pargana Nisankpur Karha, District Bhagalpur. hereafter called the Second Party of the other part, whereas the said Maharaja Harballab Narain Singh Bahadur. K.C.I.E., died intestate on the 1st April, 1907, leaving considerable property moveable and immovable, commonly called the Sonbarsa estate, mostly situate in Pargana Nisankpur Karha in the Sub-Division of Madhipura, in the District of Bhagalpur, but also situate in part in Pargana Farakya in the District of Monghyr and leaving behind him no male issue, but only two widows, namely the Second Party, and an only daughter, namely, Maharaj Kumari Padmavati, mother of the First Party, and two daughter's sons by the said daughter namely the First Party, and whereas on the death of the said Maharaja Bahadur, the second party succeeded to and came into possession of all property, moveable and immovable, left by him with the rights of Hindu widows under the Benares School of Hindu Law, which governs the family of the said Maharaja Bahadur, and whereas by reason of the Second party being pardanashin ladies, incapable of managing a big property like the Sonbarsa estate the Court of Wards has taken up the management of the said estate, under the provision of Act IX of 1879 (B. C.,) on their behalf, and is all present managing the property through Rai Saheb Nilmoney Dey, Manager appointed under the provisions of the said Act ; And whereas the said Maharaj Kumari Padmabati died on 20th (twentieth) day of May, 1915. And whereas the Second Party, who are now growing old and are desirous of remaining aloof from the concerns of the world, and of spending their latter days in Divine worship and meditation in the holy city of Benares, have proposed to surrender their estate to the First Party who are now the next reversionary heirs of the said Maharaja Bahadur under the Hindu Law on getting a suitable maintenance for the remainder of their natural lives, and an assurance that the worship of the family deities at Sonbarsa should be kept up and maintained in the proper stage by the First Party. And whereas the first party have agreed in the event of the said surrender being made, to give the Second Party or the survivor of them, a maintenance allowance of Rs. 2,000 (rupees two thousand) per mensem, and also to keep up and maintain the worship of the said family deities in a suitable style at the cost of Rs. 100 (rupees one hundred) per mensem. And whereas the Second Party consider the said amount of maintenance allowance and of the expenses of worship fair and reasonable, and therefore they are executing the deed of surrender contemplated by them. The First Party, therefore, in consideration of the premises, do hereby agree of their own free will and accord that from the day they become the proprietors of the said Sonbarsa estate, by reason of the surrender aforesaid they and their heirs, successors, executors, administrators and assignees shall pay to the Second Party or the survivor of them, so long as they or either of them live or lives, the monthly sum of Rs. 2,000 (rupees two thousand) for their maintenance in a style suitable to the rank and position held by their deceased husband, and if they fail to pay the allowance due for any months (which is to be taken as an English month) on the first day of the following month, the Second Party will be at liberty to enforce the payment thereof, with simple interest at the rate of twelve per cent. per mensem by process of Court, and the said arrears of allowance, with interest and the costs of the suit if any to enforce the payment thereof shall be the first charge on the property mentioned in the schedule hereto annexed which form a part of the estate surrendered by the Second Party as mentioned above. And

the first party further agree, that from the day aforesaid they shall keep up and maintain the daily and periodical worship of the family deities Lachmi Narain Jeo, Ram Chunder Jee, and Radha Krishen Jeo, installed at the Sonbarsa house left by the said Maharaja Bahadur, at a cost of Rs. 100 (rupees one hundred) per mensem (the month being taken as an English month), and should they omit or neglect to carry this agreement the Second Party will be entitled to enforce the fulfilment thereof. In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written in the presence of witnesses: (1) Bindheyswari Prasad Singh, High Court Vakil, Monghyr: (2) Ajodhya Prasad Chaudhury, M. C,, resident of Kasim Bazar, Monghyr."

That agreement was registered on the 18th December, 1918.

On the 23rd December, 1918, the two widows sent the following letter to the Collector of Bhagalpur :—

" To The Collector of Bhagalpore.

Dated Bhagalpore, the 23rd December, 1918.

SIR,

We have the honour to state the following for your information :—

That we are disqualified proprietresses of the estate known as the Sonbarsa Estate and we are Wards of the Court.

That we have two grandsons named Rao Bahadur Gobind Singh and Rudrapratap Singh.

That for some time past we had been contemplating surrendering our rights to the estate in favour of our grandsons who are the reversioners to the estate and we had informed Mr. B. C. Sen, I. C. S., the then Collector and the Hon'ble Mr. H. J. McIntosh, I. C. S,, the then Commissioner, informally about our intentions.

That we have kept Mr. Sen informed informally about all the steps that we have been taking in connexion with our intention to surrender the estate.

That we had taken the best legal advice (e.g.) of the Government Advocate, Bihar and Orissa and Government Pleader, Bhagalpore, and we were given to understand that under the law we had every right to surrender the estate in favour of our two grandsons.

That in pursuance of our intentions to keep the authorities informed about all our actions in connexion with the surrender, we so far back as March, 1918, sent a copy of the proposed deed of surrender to the Collector of Bhagalpore with our forwarding letter, dated the 4th March, 1918.

That we have executed and registered the deed of surrender on the 18th instant and as provided in para. 4 of the said deed we beg to inform you about the same and request you to take steps to make over the charge and management of the said properties to Rao Bahadur Gobind Singh and Rudrapratap Singh, our two grandsons aforesaid, if the Court of Wards do not think fit to retain management under S. 13 (a) of Act IX of 1879 (B. C.).

That we have been given to understand that our two grandsons aforesaid are applying for the mutation of their names in the registers maintained under Act VII of 1876 (B. C.) and that we have no objection to their so doing.

We have the honour to be,

Sir,

Your most obedient servants,

(Sd.) Sri Maharani Tarabati.

(Sd.) Sri Maharani Nowlakhbati,

Maharanis of Sonbarsa."

The gentleman whom the widows mentioned as the Government Advocate and Government Pleader in giving any advice to the widows acted as their legal adviser and not in any respect as representing the Court of Wards.

On the 15th April 1919, the Court of Wards, through their Deputy Collector, sent the following reply to the widows to their petition of the 23rd December, 1918 :—

To

Maharani Tarabati Kumari and Nowlakhabati Kumari, Sonbarsa.

Their petition No. nil, dated the 23rd December, 1918.

The Maharanis of Sonbarsa are informed that the Board of Revenue, Bihar and Orissa considers that the deed of relinquishment executed by them in favour of their grandsons is invalid.

(Sd.) H. Bhattacharyja,

Wards Deputy Collector."

The Court of Wards had never given any sanction to the widows or to either of them to create any charge upon or interest in the property of the wards or any part thereof.

In February, 1919, Gobind Singh applied to the Court of the Deputy Collector of Bhagalpur for mutation of names in his favour in respect of an eighth share in the estate on the ground that he had a right to the moiety of the estate, his contention being that the deed of the 18th December, 1918. operated as a surrender of the interests of the widows of their interests in the estate. Rudra Pratab Singh did not oppose the application. The application was opposed by the Manager of the Court of Wards on various grounds, one of which it is only necessary in the view their Lordships take of the law applicable to the case to consider, and that is that the Court of Wards had not sanctioned the so-called surrender and that it was consequently invalid under S. 60 of the Court of Wards Act, 1879. That section is as follows:

"60. No ward shall be competent to create, without the sanction of the Court, any charge upon, or interest in, his property or any part thereof."

The Court in that section mentioned was the Court of Wards. Gobind Singh's application for mutation of names was rejected. Gobind Singh died in October, 1919. Maharani Tarabati died in August, 1920. Man Singh, who was the son of Gobind Singh, brought this suit on the 17th January, 1921. In his plaint Man Singh referred to the deed of the 18th December, 1918, and relied upon it as a surrender by the widows of their interest as proprietors of the Sonbarsa estate and as having vested that estate in his father, Gobind Singh, and in Rudra Pratab Singh. The eleventh, twelfth and thirteenth paragraphs of the plaint state the title upon which the suit was brought thus:

"11. That by the said deed of surrender the said Maharanees having put an end to their life estate as Hindu widows in favour of the entire body of the then reversioners the aforesaid Rao Bahadur Gobind Singh and Rudra Pratap Singh the defendant, second party in the aforesaid Sonbarsa estate, all the properties both moveable and immovable appertaining to the said Sonbarsa Estate vested solely and absolutely in the said reversioners, who became entitled to hold, possess and enjoy the aforesaid estate as the absolute owners of and successors to the properties Het by their maternal grandfather by right of inheritance undes the Benares School of Hindu Law.

12. That as the aforesaid heritage being one which is known as obstructed heritage, the plaintiff's father Rao Bahadur Gobind Singh and Rao Bahadur Rudra Pratap Singh, the defendant, 2nd party acquired equal rights in the same and the share of each being a moiety of the said properties.

13. That the plaintiff's father, Rao Bahadur Gobind Singh, died in October, 1919 leaving the plaintiff his only son and the sole heir to his estate and he is lawfully entitled to all the rights and interest acquired by his late father in the aforesaid Sonbarsa estate by virtue of one aforesaid deed of surrender."

Man Singh, the plaintiff, prayed for the following amongst other reliefs:—

"(a) That the Court be pleased to declare that by the deed of surrender and the ekrarnama, dated the 18th of December 1918, the plaintiff's father and the defendant 2nd party became entitled as the next immediate reversionary heirs of the late Maharaja Sir Harballv Narain Singh Bahadur K.C.I.E., to all the properties left by him and the defendant, 1st party has no right to withhold possession of the Sonbarsa Estate from the plaintiff and the defendant 2nd party.

That the Court be pleased to pass a decree for recovery of possession of all the properties moveable and immovable mentioned in Schedules A and B annexed to the plaint as well as any other properties that may be found on discovery to appertain to the Sonbarsa Estate in favour of the plaintiff and the defendant 2nd party by dispossessing the defendant 1st party."

In Schedule B of the plaint, which contains a list of the moveable properties which were claimed: carriages, palkis, cattle, elephants, bullocks, cows, buffaloes, horses, and other things are mentioned as having been retained in the possession of Maharani Nowlakhbati.

The defendants, Maharani Nowlakhbati and Rudra Pratab Singh filed separate written statements. The Maharani Nowlakhbati in her written statement pleaded amongst other things that the widows being disqualified persons and their estate being under the management of the Court of Wards, they had no authority to execute the alleged deed of surrender without the sanction of the

Court of Wards and that the plaintiff's father did not acquire any valid title under the said deed, and also did not admit as correct the view of the law propounded in paragraphs 12 and 13 of the plaint and put the plaintiff to proof of his title.

The defendant Rudra Pratab Singh in his written statement pleaded amongst other things that the alleged deed of surrender was not a surrender of the whole interest of the Maharani's and was void and illegal, and also that it was void and ineffectual as not having the sanction of the Court of Wards. Rudra Pratab Singh by his written statement put the plaintiff to proof of his title.

The Subordinate Judge framed twelve issues, of which the fifth is in the opinion of their Lordships the crucial issue in this case. It was "5. Is the deed of surrender valid having regard to the provisions of S. 60 of the Court of Wards Act (IX of 1879)?" If it is found that the deed of the 18th December 1918, was in contravention of that section the plaintiff's suit fails and this appeal fails, and it is not necessary for their Lordships to consider whether the widows understood the deed or had executed it under any misrepresentation as to its object or effect, or without any independent advice, or to consider any other issue or the questions of law raised in the eleventh paragraph of the written statement of the Maharani Nowlakhbati, which was that "the plaintiff should prove that he is entitled to a moiety share in the Sonbarsa Estate, even if the said deed of surrender be held to be a valid document." Whilst saying this, their Lordships feel it right to say that the lengthy and elaborate judgments of the Courts below have been of assistance to them in understanding the facts which were in dispute between the parties to this suit.

In this case no question, that there was any necessity for the surrender, arose. There was in fact no necessity for a surrender of the interest of the widows. The Subordinate Judge and the High Court in appeal concurrently found in effect that the parties to the deed of the 18th December, 1918, intended by that deed that the widows should surrender some of their interests in the Sonbarsa Estate to Gobind Singh and Rudra Pratab Singh, and that the so-called surrender was void as being in contravention of S. 60 of the Court of Wards Act, 1879. Those learned judges might have found on the facts that the deed was void independently of S. 60 of the Act.

The question as to whether a surrender without necessity by a Hindu widow of her widow's interest in her deceased husband's estate, even in favour of the nearest reversioner, is valid was considered by the Board in *Rangasami Gounden* v. *Nachiappa Gounden* (1). In the judgment of the Board in that case, at page 84, it was said that :

" The result of the consideration of the decided cases may be summarized thus : (1). An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a bona fide surrender, not a device to divide the estate with the reversioner."

In *Sureshwar Misser* v. *Maharani Misrain* (2), the Board affirmed that pronouncement of the law. In the latter case in which the parties were subject to the law of the Mithila school, the widow of the deceased proprietor on the death of her infant son took absolutely the moveable property. In that case there were serious disputes in the family as to title and the next reversioners to the son sued the widow and her daughters to set aside the Will of her husband under which the daughters were entitled to succeed to the immovable property on the death of the son without issue. A family compromise was agreed to, and in performance of it the widow surrendered all her rights of succession to the immovable property and the plaintiff the next reversioner, and her daughters gave her for her life a small portion of the land for her maintenance. The Board held that the compromise was a bona fide surrender of the estate, and not a device to divide it

(1) [1919] 42 Mad. 523=46 I. A. 72=36 M. L. J. 493=17 A. L. J. 536=29 C. L. J. 539=21 Bom. L. R. 640=10 L. W. 105=23 C. W. N. 777=(1919) M. W. N. 262=26 M. L. T. 5 (P. C.).

(2) [1920] 48 Cal. 100=47 I. A. 233=39 M. L. J. 161=18=A. L. J. 1069=25 C. W. N. 194 =12 L. W. 461= (1920) M.W. N. 472=28 M. L. T. 154 (P. C.).

with the next reversioner, the giving of a small portion of it to the widow for her maintenance not being objectionable, and consequently that the transaction was valid under the principles laid down by the Board in *Rangasami Gounden* v. *Nachiappa Gounden* (1).

The so-called surrender in the present case was, as stated above, void in law, and was also void as being in contravention of s. 60 of that Act.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for Appellant—Barrow, Rogers and Nevill.

Solicitors for Respondents—Watkins and Hunter.

** A. I. R. 1926 Privy Council 9

(FROM PATNA : A. I. R. 1922 PATNA 243)

5th December, 1925.

Lords Phillimore and Blanesburgh and Sir John Edge.

Lal Chand Marwari—Appellant

v.

Mahant Ramrup Gir and another—Respondents.

Privy Council Appeal No. 34 of 1924 from Patna Appeals Nos. 28, 26, 27 and 30 of 1922.

** (a) *Evidence Act, s. 107—There is no presumption that a person not heard of for seven years was dead at the end of 7 years.*

It is constantly assumed that, where the period of disappearance exceeds seven years, death, which may not be presumed at any time during the period of seven years, may be presumed to have taken place at its close. This is not correct. The presumption is the same if the period exceeds seven years. The period is one and continuous, though it may be divisible into three or even four periods of seven years. Probably the true rule would be less liable to be missed, and would itself be stated more accurately, if, instead of speaking of a person who had not been heard of for seven years, it described the period of disappearance as one "of not less than seven years." [P. 11, C. 2.]

(b) *Limitation Act, Art. 144—Scope.*

Where plaintiff claims as heir to a life-holder who is not heard of since over 7 years and defendants are in possession for over 12 years, Article 144 applies and plaintiff must prove date of death within 12 years of suit. 12 M. I. A. 342 ; 5 Cal. 36 Appr. [P. 12, C. 1]

*(c) *Evidence Act, s. 115—Scope.*

Where plaintiff failed in prior suit on certain facts alleged by defendant and denied by him, defendant is not estopped in later suit from taking advantage of plaintiff's evidence about the facts in the later suit though it conflicts with defendant's allegation in the prior suit.

DeGruyther and E. B. Raikes—for Appellant.

A. M. Dunne and W. Wallach—for Respondents.

Lord Blanesburgh :—These are consolidated appeals by the defendants in four out of eight suits instituted by one Ramrup Gir in the Court of the First Sub-Judge at Muzafferpur on the 30th November, 1916. The suits were brought on the allegation that the plaintiff, as the then Mahant of an asthal or math at Paprikhan Karan, was entitled to recover from the defendants different properties, endowments of the math, then in their possession. These properties had, it was alleged, been alienated without warrant by Bhawan Gir, deceased, the immediate predecessor as mahant of the plaintiff. The suits, as they progressed, were amended by the joinder, as co-plaintiffs, of three persons to whom, in consideration of their supplying funds for the conduct of the litigation, Ramrup Gir had agreed to transfer, when recovered ,certain portions of the properties in question. As so amended, they were heard at length by the learned Subordinate Judge, and, on appeal, by the High Court at Patna, where many issues were raised and strenuously contested. Of these, one only remains for determination by their Lordships, namely, the issue of limitation. The learned Trial Judge held that the suits were barred by statute. The High Court, on appeal, held that they were not, and made decrees for possession of the properties with mesne profits. It is against these decrees and on the ground that the suits should have been dismissed as being out of time, that the present appeals have been brought and argued.

The math in question has a considerable history. It is a math of the Sanyasis who are celibate and have renounced the world. The properties in suit had been amongst its endowed properties for a period of nearly 150 years. They stood in the name of the mahant for the time being, but he had no right to alienate them otherwise than for necessity. The income from them at one time, at all events, amounted to Rs. 4,000 a year, appropriated not to a single deity, but for Puja of Siuji, the principal deity, for the Pujas of the other established deities of the math and in the entertainment of mendicants and ascetics. These

matters, all in dispute in the Courts below, were not again raised in contest before the Board, and may now be taken to be accepted.

In the year 1880 or shortly afterwards, Bhawan Gir became mahant of this asthal or math. He had, as his elder Chela, the plaintiff Ramrup Gir, and, as his younger Chela, one Harihar Gir. Bhawan Gir was drunken, immoral and dissolute, and, as might be expected of such a person, profligate and extravagant. Portions of the endowed properties he mortgaged without justification, by way of security for loans made to himself. Other portions, equally without justification, he purported to sell outright. The proceeds in every case were, it can hardly be doubted, spent mainly, if not entirely, upon himself. The properties mortgaged have since been sold under decrees made in suits brought to enforce the securities. And so it has come about that those properties now in dispute have all of them been in the exclusive possession of the defendants or their predecessors in title, as for absolute interests, for periods exceeding on the 30th November, 1916, in every instance a term of 26 years of continuous du ration.

By 1888, Bhawan Gir had denuded himself and the math of all its endowed properties. In March, 1892, he made the asthal over to the plaintiff, and, as the plaintiff recites in a deed of sale of the 15th June, 1917, left the place for good. And he has never returned. He went on pilgrimage and Harihar Gir went with him. Some weeks later, Harihar Gir came back alone and reported to the plaintiff that Bhawan Gir had died in his arms at Hardwar on the 27th April, 1892.

The plaintiff accepted that statement. It was, of course, then greatly to his interest to do so. He had become mahant if it were true. It is, however, contrary to his interest now to accept it. Indeed, if the fact be as stated, it is fatal to his present claims. Yet in his evidence in these suits —to his credit be it said —he has again declared his belief that Harihar Gir's statement as to Bhawan Gir's death at Hardwar in April, 1892 is in accordance with fact. And his actions since the date of Harihar Gir's return, if they be honest, have been consistent, and consistent only with a constant belief that Bhawan Gir was dead. Almost at once he performed his Bhandara and Shadh, and he was himself instituted as mahant of the math and got Chudder and Pagree and was installed in the Gadi. Three years later, that is to say on the 16th April, 1895, with money found by others on terms analogous to those on which the funds for the present litigation have been obtained, he instituted a series of suits against the present defendants or their then predecesesors in title to recover the properties on the allegation that he had on the death of Bhawan Gir succeeded thereto as mahant. In those suits the plaintiff gave evidence to the effect just stated. Harihar Gir too was called as a witness, and he directly deposed to Bhawan Gir's death in his presence on the date already given. His statements at that date were of course highly interested. Moreover, it was essential to the plaintiff's case then that they should be true. The learned Trial Judge, however, disbelieved them, accepting as preferable, and perhaps as true, a body of evidence adduced by the then defendants —suspicious only because of its volume and circumstance—that Bhawan Gir was alive after April, 1892: that indeed he had been seen alive in 1895 after action brought. For the reason therefore that the plaintiff had failed to establish the fact essential to the validity of his claim, namely, that Bhawan Gir was dead when the suits were instituted, the Trial Judge, by decrees dated the 27th January, 1896, dismissed them all with costs. The plaintiff appealed to the High Court, but the learned Judges of that Court, finding themselves unable on the materials before them to review the Trial Judge's finding on this issue of fact, by orders dated the 30th November, 1897, dismissed the appeals. And so that litigation ended. Attention must be given to this last date. It will be found that the plaintiff sets great store by it in these proceedings.

The plaintiff in 1905 again performed the Bhandara of Bhawan Gir and was again installed in the Gadi, although in his own view, as he stated in evidence in these suits, that ceremony was neither essential to his institution nor redundant in its repetition. On the 30th November, 1916, he instituted the present litigation. The date is significant. Required by Or. VII, r. 1 (*e*) of the First Schedule to the Code to set forth in his plaint the facts constituting his cause of action, and when it arose, the plaintiff in each of the plaints alleges that the Judges of the High

Court in the earlier proceedings had, on the 30th November, 1897, accepted the then defendant's statement that the plaintiff's Guru, Mahant Bhawan Gir, was then alive: that no particulars regarding him had been known for seven years from the date of that judgment, and that it was necessary for the plaintiff to accept the 30th November, 1904, as the date of death of his Guru, when the cause of action accrued to him. His suits were in time—such is the implication of the allegation, and such is his way of establishing it—in that they were commenced within twelve years to a day from the 30th November, 1904.

This view is undoubtedly mistaken. It would be fatal to the plaintiff if it were not. For his case on his chosen foundation fails upon the facts. It is not correct to say that the High Court in the earlier litigation found that Bhawan Gir was alive on the 30th November, 1897. What that Court did find, affirming the Subordinate Judge, was that he had not been proved to be dead on the 16th April, 1895. The latest date at which anyone deposed to his being alive was a later date in the same year. And there is no evidence, either in that litigation—if it may be regarded—or in this, that he has ever since been heard of. So far indeed as the present suits are concerned, the only testimony adduced, apart from that of Harihar Gir, is that he has been neither seen nor heard of since he left the math in March, 1892. Putting the case therefore at its highest for the plaintiff—that is excluding altogether from consideration both Harihar Gir's direct evidence of death and the plaintiff's belief in its truth—the position is that Bhawan Gir has not been seen or heard of since the year 1895. If so, on the principle set up by the plaintiff, he must be presumed to be dead by the end of 1902. Accordingly these suits commenced only in 1916 are clearly statute barred as against the defendants.

But the law really is that on the facts now assumed there is no presumption as to Bhawan Gir being dead either in 1902 or 1904. There is only one presumption, and that is that when these suits were instituted in 1916 Bhawan Gir was no longer alive. There is no presumption at all as to when he died. That, like any other fact, is a matter of proof. And their Lordships would here observe that it strikes them as not a little remarkable that the theory on this point, on which the plaintiff's pleader hazards his whole case, is still so widely held, although it has so often been shown to be mistaken. The learned Judges of the High Court have in these suits pointed out the plaintiff's error. Yet, in another part of their judgment, if their Lordships are not mistaken, they have themselves unconsciously fallen into it. They have made a decree in the plaintiff's favour because they had, as they thought, no reliable evidence as to the date of Bhawan Gir's death, and because in their judgment it was for the defendants to prove that date if they relied on it. Yet at the same time they have acceded to the plaintiff's claim for mesne profits which, at all events as claimed, are those profits accruing three years prior to the institution of the suits. This imports that Bhawan Gir was dead at that date. But if he was, then the same evidence showed that he had died many years before. The evidence, indeed, if regarded at all, required the Court not to allow mesne profits but to dismiss the suits altogether.

Now upon this question there is, their Lordships are satisfied, no difference between the law of India as declared in the Evidence Act and the Law of England [*Rango Balaji* v. *Mudiyeppa* (1)] and searching for an explanation of this very persistent heresy, their Lordships find it in the words in which the rule both in India and in England is usually expressed. These words taken originally from *In re Phene's Trusts* (2) run as follows :—

> "If a person has not been heard of for seven years, there is a presumption of law that he is dead : but at what time within that period he died is not a matter of presumption but of evidence, and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential."

Following these words, it is constantly assumed—not perhaps unnaturally—that where the period of disappearance exceeds seven years, death, which may not be presumed at any time during the period of seven years, may be presumed to have taken place at its close. This, of course, is not so. The presumption is the same if the period exceeds seven years. The period is one and continuous, though it may be divisible into three or even four periods of seven years. Probably the true

(1) (1899) 23 Bom. 296.
(2) L. R. 5 Ch. 139=39 L. J. Ch. 316=18 W. R. 393=22 L. T. 191.

rule would be less liable to be missed, and would itself be stated more accurately, if, instead of speaking of a person who had not been heard of for seven years, it described the period of disappearance as one "of not less than seven years."

To resume, however. It is manifest that the attempt made by the plaintiff in his plaint to comply with Order VII, r. 1, (*e*) and set forth the date when his cause of action arose has failed him on the facts. The result is to disclose, so far as he is concerned, a very serious position. It is made plain by the plaint that as against him the defendants had, at the institution of the suits, been by themselves and their predecessors in adverse possession of the properties in question for more than 12 years —in point of fact since 1895 at least when the earlier litigation against them was commenced by the plaintiff, and which is the last year in which anyone proposes that Bhawan Gir was seen alive. The plaint itself accordingly discloses a state of things to which s. 144 of the Limitation Act is applicable. In such circumstances, it may well be that it is the obligation of the plaintiff by the law of India, as it is by the law of England, to satisfy the Court that his action is not barred by lapse of time. See as to India, *Raja Sahib Perlad Sein* v. *Maharajah Rajender Kishore Singh* (3); *Mahomed Ibrahim* v. *Morrison* (4); as to England :— "There is no doubt," said the Court of Queen's Bench in *Doc* v. *Nepean* (5) "that the lessor of the plaintiff must recover by the strength of his own title and, in order to do so, must prove that he had a right to enter on the lands sought to be recovered within twenty years before ejection brought."

To all of which may be added the comment by Lord Justice Giffard on *Doc* v. *Nepean*, that the onus of proving death of any person at any particular period must rest with the person to whose title that fact is essential. *In re Phene's Trusts* (2) at pp. 151-2.

On this footing therefore the plaintiff here would fail in the absence of evidence of the death of Bhawan Gir within twelve years before the institution of the suits.

But it is unnecessary in the state of the evidence in this case to proceed upon any such strict view of the plaintiff's position. He has himself, and in these suits, supplied affirmative evidence which their Lordships cannot disregard. Harihar Gir was called as a witness on his behalf. In his evidence in chief he solemnly deposed that Bhawan Gir died in his presence at Hardwar in April, 1892. In cross-examination he added that he himself performed his funeral ceremonies, and that if anybody said that he did not die in April, 1892, it would be false. And by way of confirmation the plaintiff stated in his evidence, as their Lordships have already observed, that he himself believed that Haribar Gir was telling the truth in this matter, while, as has also been shown, his own actions and claims ever since have alone been consistent with that belief.

To their Lordships it seems impossible that such evidence adduced by the plaintiff himself, fatal as it is to his case, can be ignored. They are not blind to the difficulty. They do not forget the wealth of circumstantial evidence to the effect *that* Bhawan Gir was alive as late as 1895, adduced by the defendants or their predecessors in title in the earlier litigation, and then accepted and acted upon by the Trial Judge to the plaintiff's undoing. They do not forget that at that time such evidence was vital to the defence, nor do they fail to note the absence now of any counterpart to it when the lapse of time has made it, to the highest interest of the defendants, to accept the plaintiff's story that Bhawan Gir has been dead all these years. Their Lordships bear all this in mind, and see no occasion to commend these highly sophisticated tactics of the defendants. But they find it impossible to ignore the consistent attitude of the plaintiff, supported now by uncontradicted direct evidence of death and a wealth of concurring testimony to the effect that since Bhawan Gir abandoned the math in 1892 with Harihar Gir he has not been seen or heard of. If these suits were being brought against defendants, neither parties nor privies to the earlier litigation, there could, in their Lordships' view, have been no question that the evidence now adduced on behalf of the plaintiff would have been completely destructive of his case. Is the position of the defendants so compromised by their attitude in the earlier litigation, that they

(3) (1867-69) 12 M. I. A. 342=12 W. R. 6=2 B. L. R. 111=2 Suther 225=2 Sar. 429 (P. C.).
(4) (1880) 5 Cal. 36.
(5) 5 B. & Ad. 94.

are in effect estopped from deriving benefit from the plaintiff's evidence of death even if it now by reason of the lapse of time has gained so greatly in force? It is of course hard upon the plaintiff that evidence rejected in 1895, when it would have helped him, should now be accepted when it hurts him. On the other hand, it must be remembered that the complete disappearance, down to the present time, of Bhawan Gir and the now disinterested character of the evidence adds, to the plaintiff's story of his death, a strength from external circumstances altogether lacking in 1895. Moreover, to ignore the evidence altogether would be to fly in the face of the statute.

The difficulty of the plaintiff's present position in this matter was not, it would seem, at all appreciated in the Courts below. Das J. in the High Court, for instance, proceeded upon the footing that his evidence on this point was adduced only in the earlier proceedings, and the learned Judge disposed of the point :—

"It is quite true that it was the plaintiff's case in the suit which he instituted in 1895 that Bhawan Gir died on the 15th Baisak, 1299, but that case was not accepted by the Courts."

That is all. To the evidence in the present suit the learned Judge makes no allusion. It is that evidence which their Lordships find themselves unable to ignore. The plaintiff must, as it seems to them, take the consequences of solemn testimony given by himself and adduced on his behalf.

This disposes of the case, and it is unnecessary for their Lordships to deal with the important and difficult question whether here the statute did not commence to run in favour of the defendants from the dates of the wrongful alienations of the properties or at all events from the date of his final abandonment of his office by Bhawan Gir and not only from his death. Whether, in other words, the case is governed by the decisions of which *Damodar Das* v. *Lakhan Das* (6), may be taken as the leading authority : or by the line of authority of which *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (7), may be taken as typical. Their Lordships, while not pronouncing upon it, have given very careful consideration to this interesting and difficult question. Upon it they say no more than this, that they must not be taken to accept the view with reference to it propounded by the High Court. So far as they are concerned, the question remains entirely open to be determined when it arises.

For the reasons above given, however, they are of opinion that the decree of the High Court should be recalled and that of the Trial Judge restored, and they will humbly advise His Majesty accordingly. The respondents must pay to the appellants their costs before the Board and in the High Court.

Solicitors for Appellant—Witkins and Hunter.

Solicitors for Respondent—Hy. S. L. Polak.

(6) (1910) 37 Cal. 885=37 I. A. 147=14 C. W. N. 889=12 C. L. J. 110=1910 M. W. N. 303=7 A. L. J. 791=8 M. L. T. 145=20 M. L. J. 624=12 Bom. L. R. 632 (P. C.).

(7) A. I. R. 1922 P. C. 123.

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* A. I. R. 1926 Privy Council 13

(From Patna).

4th December, 1925.

Lords Shaw and Phillimore, Sir John Edge, Mr. Ameer Ali, and Lord Salvesen.

Maharaj Bahadur Singh—Appellant

v.

Seth Hukum Chand and others—Respondents.

Privy Council Appeal No. 36 of 1924, from Patna Appeals Nos. 7 of 1923 and 52 of 1921.

* (a) *Religious endowment—Improvement or rebuilding by one section does not give the section exclusive right to property.*

Where buildings were already dedicated to the common use of both sections of a community, the contribution to the common religious buildings by one section for rebuilding or improving largely can create no exclusive right in favour of the section.

[P. 15, C. 1.]

(b) *Religious endowment—Common property.*

Building upon common land and using the building is sufficient evidence of appropriation.

[P. 15, C. 2.]

L. DeGruyther, *G. R. Lowndes*, and *B. Dube*—for Appellant.

A. M. Dunne, *E. B. Raikes* and *Champat Rai Jain*—for Respondents.

Lord Phillimore.—The circumstances which have given rise to these consolidated appeals from the High Court at Patna are briefly as follows :

The professors of the Jain religion have been for a very long period divided into two sections, the Swetambara (whiteclothed) and the Digambara (clothed with the sky—an expression for the unclothed).

The division is so ancient that it is apparently uncertain whether it took place some little time before or some little time after the Christian era. There is some suggestion in the papers before their Lordships that there are certain differences of doctrine, but the division is principally in matters of ritual and worship. Broadly speaking, the Swetambara, after washing the sacred imgaes, clothe them and decorate them before worship, while the Digambara remove all covering before they worship; and the ritual which is applied to the images, is also applied to certain sacred footprints.

The Jains recognise 24 highly saintly personages—men who have attained salvation or Nirvana, who are called Tirthankars (finders of the ford, across the river of death). These four and twenty are counted in many respects as higher than the gods or some of the gods in the Hindu Pantheon.

Twenty of them are believed to have attained Nirvana in the present cycle of the world's history upon the Hill Parasnath in the district of Hazaribagh in Bengal, with the result that the hill is held in reverence by Jains. The hill itself has some remarkable natural features, and rises into several peaks. Twenty spots, apparently marked out by natural features, are believed to be places from which the 20 Tirthankars quitted earth; and at each of these spots, a footprint of the Saint is worshipped. There is a small enclosure covered with a cupola, which at the present moment, is made of white marble. These spots have been set apart from remote antiquity. The four remaining Tirthankars quitted earth in other parts of India. In respect of them, conventional spots have been since the year 1868 set apart and treated in a similar way.

Upon the hill there are also a shrine to a lesser Saint called Gautama Swami, an important temple in one of the highest parts of the mountain—called Jalmandil, certain platforms set apart for religious contemplation and two Dharamsalas or rest-houses for pilgrims. The hill is much frequented by pilgrims, who take the 24 shrines or tonks in regular order, worshipping at each.

According to the tenets of the Digambara, this worship must be performed fasting, and the whole hill is so sacred that from the moment they set foot on it, they must abstain from any office of nature, even spitting. The Swetambara do not so limit themselves.

For many years, the Rajah of Palgunj, in whose zemindari the hill is, appears to have managed and kept in repair the temples and tonks and to have taken the offerings from the pilgrims. But in 1872 the Swetambara made an agreement with the Rajah for an annual payment, and proceeded to take the offerings for themselves and to manage and keep in repair the sacred places.

As time went on, differences in respect of their different mode of worship and the confusion resulting from different sets of pilgrims desiring to carry out their own ritual led to disputes between the two sections; and proceedings were taken to have a "record of rights" under the Chhota Nagpur Tenancy Act of 1908 established. A Record of Rights was framed by the proper officer, and a table was drawn up in which the whole hill was described as "private unculturable land," and then 48 items described as house, temple, tonk or platform, were enumerated, and the following description was added:

> "Temple and dharamsala referred to in this Khata in which all the Jains have the right to stay and to make Puja (worship) without the permission or opposition on the part of any person."

Whether the words "temple" and "dharamsala" referred only to the first two items, or whether it was intended that the description should apply to all the 48 does not clearly appear. But whichever is the true construction, it was considered by the Swetambara to be unfavourable to them, and accordingly the present suit was instituted on their behalf, impeaching the record and claiming

> "(*b*) That it be declared that the defendants as also the whole Digambari sect of Jains have no right to worship in the temples on the Pareshnath Hill in Gadi Palgunj, Sub-District Giridih District Hazaribagh, without permission of the Sitambari sect of Jains and in a mode not approved by them and that they cannot occupy the Dharamsalas on the said Hill without similar permission.
>
> "(*c*) That an order be passed directing the correction of the entry in the Khas Khatian of Khewat No. 7 to the effect that the Digambaris sect of Jains can worship in the temples on the Pareshnath Hill only with the permission of the Sitambari Jains and in a mode approved by them and can occupy the Dharamsalas only with their permission."

When the case came on for trial, it was found that there were 31 edifices in dispute. Of these 5 (Numbers 26 to 30), which

were structures or platforms for purposes of contemplation, were admitted to be exclusively devoted to the Swetambaras. In respect of the 20 tonks dedicated to or commemorating the 20 Tirthankars who found Nirvana from the hill, and the shrine of Gautama Swami, the Subordinate Judge found that both sections of the Jains had an equal right of worship; while with regard to the remaining 4 tonks and the Jalmandil temple, he found that the Digambaras had no right to worship and could only do so with the permission of the Swetambaras; and as to the Dharamsalas, he decided that they belonged to the Swetambaras, and that the Digambaras could not use them except by permission.

He appended to his finding an observation about the "usual practice" as to which their Lordships will make a separate reference subsequently.

Appeal and cross-appeal were brought from this decision, but it was affirmed. And both parties have now appealed to His Majesty in Council.

Much of the case turns upon disputed questions of fact; and upon all the important questions of fact subject to one reservation, both Courts have come to the same conclusion, while nothing has been brought to their Lordships' notice which would induce them to depart from their usual rule of accepting concurrent conclusions of fact.

Taking now the case of the 20 tonks and the shrine of Gautama Swami, it is clear that they are of ancient date, and that the holiness of the sites may go back to a time anterior to the division into Swetambaras and Digambaras.

No doubt the Swetambaras being the richer sect, have rebuilt or largely improved the present buildings. But if the ancient buildings were already dedicated to the common use of both sections, this contribution to the common religious buildings can create no exclusive right. Upon this short ground their Lordships think that the decision should stand.

Now as regards the 4 tonks commemorating the Tirthankars who attained Nirvana from different places in India. As to these, there is no ancient appropriation of site. They were marked out and built upon by members of the Swetambara section as late as 1868. No doubt Digambaras as well as Swetambaras have worshipped in them; but their Lordships agree with the Courts below that there is no evidence that they worshipped in them as of right. They may well have done so by permission of the Swetambaras, and there is nothing in the papers to show that this permission will not continue to be given, subject to such conditions as the prior claim of the Swetambaras may demand.

It was urged before their Lordships that there was no legal appropriation of the site of these tonks; but counsel for the Digambaras, while urging this argument, requested their Lordships to decide no question of title with regard to the ownership of the hill, stating that there was a suit pending in India which involved this question.

Confining themselves therefore to what appears in the papers in the present case, their Lordships would gather that at any rate there was no title in the Digambaras which could prevent the Swetambaras from lawfully acquiring possession of the 4 sites.

If the title be in the Rajah, there is quite sufficient evidence of a grant by him for this purpose.

The only conflicting suggestion was that in some manner the whole hill had become vested in the whole Jain religious community or was held by the Rajah in trust for that purpose.

Their Lordships neither affirm nor disaffirm this contention; but if it were proved, it would not in their opinion affect this case.

The hill is said to be of an area of about 25 square miles, rough, and as stated in the record of rights, "unculturable."

Supposing it to be dedicated to the religion of the Jains generally, it was still possible for the Swetambaras to appropriate these 4 sites, and the fact that they without interference built upon them is, at this lapse of time, sufficient evidence of appropriation.

There remains for consideration the temple of Jalmandil. As to this it is admitted that in the central chamber the images or idols are those of the Swetambaras, and that 2 of the 4 side chambers are used to contain some of their paraphernalia of worship. The Swetambaras say that the other 2 chambers either are empty or are used as lumber rooms.

The Digambaras say that their images were there and were worshipped there and

have been improperly removed by the Swetambaras.

It seems certain that the images were not there at the time when the settlement officer made his inquiry with a view to the record of rights; and the view of the Subordinate Judge was that no consecrated images had ever been there.

The High Court thought that the evidence of the one witness of respectability who said that he worshipped Digambara images in one of these rooms in 1909, was worthy of credit, and that possibly the evidence might be reconciled by supposing that some of the Digambara images had been stored there for a time.

This is the only substantial point on which the two Courts differed; but the Judges of the High Court thought that such user as they found, which might well have been permissive, gave no title to the Digambaras; and it is enough for their Lordships to say that they agree in this conclusion.

As to the Dharamsalas, the Digambaras owing to their special ascetic tenets, have not found and will not find much need to use them. At the time when they were built, the sites had not been specially consecrated or otherwise appropriated. They were built by the Swetambaras, and both Courts have found that such user as the Digambaras have had of them was by permission of the Swetambaras. On the question of title, their Lordships need only refer to what they have said with regard to the 4 tonks. In this respect as in the others, the cross-appeal fails.

Before parting with the appeal their Lordships have a further observation to make.

When the learned Subordinate Judge was dealing with the history of the case, he laid considerable stress upon the fact that, possibly for reasons connected with their ascetic rules, the Digambara pilgrims usually began their cycle of visitation of the tonks earlier in the day than the Swetambaras, so that the covering and adornments put by the Swetambaras would usually remain untouched till the following morning. And he finished his judgment by saying :

"I find so far as the 20 tonks are concerned, one sect has no right to restrict the others as to its mode of worship, provided the usual practice referred to above is observed."

In his actual decree he made no reference to this proviso. He was subsequently prayed to amend his decree by inserting this proviso, and he refused.

The Judges in the High Court agreed with this decision. Indeed, they thought that the practice had not been as uniform as it appeared to the Subordinate Judge to have been.

Before their Lordships great stress was laid by counsel for the Swetambaras upon the necessity of either inserting this proviso or making some regulation limiting the hours during which the Digambaras might worship.

Their Lordships find themselves unable, upon the materials before them, to comply with this request.

Nor do they think it necessary, as it was urged in the alternative, to remit the case to the High Court, with directions to make some such regulation.

If after or in the working out of this judgment, there should be collision between the worship of the two sections in the 20 tonks, or any difficulty should unhappily occur in the conduct of orderly worship, such a matter could be regulated by competent local authority.

Their Lordships will humbly recommend His Majesty that the appeal and cross-appeal should be dismissed with costs.

Solicitors for Appellant – *Hy. S.L. Polak.*
Solicitors for Respondents—*W. W. Box & Co.*

**A. I. R. 1926 Privy Council 16.

(FROM ALLAHABAD).

4th December, 1925.

LORDS SHAW & LORD PHILLIMORE, SIR JOHN EDGE AND MR. AMEER ALI.

Jawahir Singh - Appellant

v.

Udai Parkash and others—Respondents.

Privy Council Appeal No. 22 of 1924 from Allahabad Appeal No. 35 of 1922.

(a) *Hindu Law—Debt due from vendor to pre-emptor is antecedent.*

Debt owed to pre-emptor by vendor (Hindu father) prior to the 'pre-emption sale' is antecedent debt for which sons are liable. A contract for a loan which never was completed, to pay off a previous debt, otherwise discharged, is not an antecedent debt.

** (b) *Limitation Act, s. 7—Bar of limitation against one major son does not affect other sons—Hindu Law – Alienation.*

A suit brought by some sons within three years of their majority to set aside alienation by father is not barred though one of the sons had long before three years reached majority : 16 *Mad.* 436 and 33 *Mad.* 118, *impliedly overruled.* [P 18 C 2]

B. Dube—for Appellant.

Mr. Ameer Ali.—This is an ex-parte appeal from a decree of the High Court at Allahabad dated the 3rd July 1922, and arises out of a suit brought by the plaintiffs on the 14th September, 1919, for a declaration that a sale effected by their father, Harbans Singh, in 1906, in favour of one Dalip Singh, was not justified by any such necessity as would validate the transaction against the other members of the joint family of which Harbans Singh was the head. Dalip Singh's interests have been acquired by the present appellant, Jawahir Singh. The trial Judge held that the plaintiffs had not made out a sufficient case to invalidate the sale to Dalip Singh. He was also of opinion that the plaintiffs' claims were barred by the Statute of Limitation (Act IX of 1908) as Fateh Singh, their eldest brother, had attained majority long ago and had not questioned the sale. He accordingly dismissed the plaintiffs' suit.

On appeal to the High Court the learned Judges overruled the plea of limitation. They relied on the decisions of their own Court *Vigheswara* v. *Babayya* (1), and *Doriaswamy* v. *Saluvar* (2), and differing from the view taken by the Madras High Court, on which the Subordinate Judge had rested his judgment, they held that the conduct of Fateh Singh, the eldest brother, did not affect the undoubted rights of the plaintiffs. They also held that, save and except Rs. 1,400, the defendant-appellant had failed to establish that the consideration for the transfer of the property to Dalip Singh was for any such necessity as would make the transaction valid against the sons. They accordingly set aside the order of the first Court and made a decree in favour of the plaintiffs for recovery of the property in suit, subject to their paying into Court within three months from the date of their decree, for the benefit of the defendant, Jawahir Singh, the sum of Rs. 1,400. They further directed that if payment should not be made within the prescribed period the suit should stand dismissed with costs throughout.

From this decree Jawahir Singh has appealed to His Majesty in Council. The same contentions that were urged in the High Court have been advanced before the Board. It becomes necessary therefore, to set out some of the facts which have either been established or admitted in these proceedings.

Harbans Singh, the father, at the time he sold the property to Dalip Singh, owned a moiety of the village of Shikohpur, in the District of Meerut. The property was admittedly ancestral, in which his sons were jointly entitled. The family consisted of himself and three sons, the eldest of whom, Fateh Singh, is Defendant No. 3.

Some time in 1900 Harbans Singh became involved in debt, and he appears to have executed a mortgage of the property in favour of three money-lenders Girwar Singh and two others. In order to discharge this debt Harbans Singh entered into negotiations with one Udai Singh for the sale of the family property. A sale deed was actually drawn up in his favour for a consideration of Rs. 13,000. Thereupon Dalip Singh put forward a claim of pre-emption in respect of the property that was going to be sold. His right of pre-emption was based on the village custom which, being questioned, came before the Court and was judicially affirmed. The price of Rs. 13,000 was fixed for the joint family's moiety. The pre-emption decree in favour of Dalip Singh bears date the 27th of August, 1906. Dalip Singh, it is admitted, paid Rs. 13,000 to Harbans Singh, which he unquestionably appropriated to his own use. It further appears that whilst the pre-emption suit was proceeding the debt to Girwar Singh and the two other money-lenders was admittedly paid off. At the time of the pre-emption sale Harbans Singh executed a receipt for Rs. 13,000, dated the 19th of December 1906, in favour of Dalip Singh, stating the particulars of the moneys received by him from Dalip Singh.

As the learned Judges of the High Court point out, save and except the third item in the receipt relating to a promissory note for Rs. 1,000, dated 30th March 1904, executed by Harbans in favour of Dalip which, together with

(1) [1893] 16 Mad. 436=3 M. L. J. 216.
(2) [1915] 38 Mad. 118=25 M. L. J. 405=14 M. L. T. 401.

interest, amounted to Rs. 1,100, it showed no consideration of an antecedent character so as to make it binding on the sons. With reference to this part of the transaction the learned Judges say as follows :

"What we are concerned with is the position of Dalip Singh, who deliberately took it upon himself to thrust himself into this matter by asserting his claim to pre-empt the sale. He, therefore, made himself liable for any legal consequences which might result from the fact that he was intermeddling with a sale contracted by a Hindu father who had minor sons living jointly with him. He handed over Rs. 2,000 to Harbans Singh in cash on December 19th, 1906. He arranged with certain other persons to pay Harbans Singh Rs. 5,000 more in cash and he gave Harbans Singh a mortgage of property of his own for Rs. 4,600, the consideration of which was set down as forming part of the Rs. 13,000 which he was bound to pay under the decree in the pre-emption suit. There remains only a small sum of Rs. 1,400 which was set off against an antecedent debt, that is to say, against money previously advanced by Dalip Singh to Harbans Singh, not on the security of any alienation of joint family property in the hands of the latter, but on a simple promissory note. The date of this promissory note was more than 2 & 1/2 years prior to the execution of the receipt of December 19, 1906. There seems no reason to doubt that there was real disassociation in fact as well as in point of time between the two transactions."

It is contended that certain expressions used by their Lordships in the case of *Sahu Ram Chandra* v. *Bhup Singh* (3), that debts contracted by the father "in order to raise money to pay off an antecedent debt" support the view that in the present case the sale to Dalip Singh was to pay off an "antecedent debt," viz., the money due to Girwar Singh and his associates. In their Lordships' opinion the contention is wholly untenable ; as the High Court point out, the debt to Girwar and others had already been paid off, and no portion of the Rs. 13,000 which Harbans Singh received from Dalip Singh was applied to its discharge.

The doctrine of "antecedent debt" has been carried far enough ; if the present contention is acceded to, it would mean that a contract for a loan, which never was completed, to pay off a previous debt otherwise discharged, would become "an antecedent debt." The contention is, on the face of it, absurd.

On the question of limitation their Lordships concur with the High Court. They are of opinion that there is no substance in this appeal and that it should be dismissed ; but without costs as there is no appearance on behalf of the respondents, and their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellant.—*Hy. S. L. Polak.*

Respondents—(Ex parte.)

(3) [1917] 39 All. 437=44 I. A. 126=21 C. W. N. 698=1 P. L. W. 557=15 A. L. J. 437=19 B. L. R. 498=26 C. L. J. 1=33 M. L. J. 14=(1917) M. W. N. 439=22 M. L. T. 22=6 L. W. 213 (P. C.).

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(FROM MADRAS)

18th January 1926.

LORDS SHAW AND PHILLIMORE, SIR JOHN EDGE, MR. AMEER ALI AND LORD SALVESEN

(Sri Mirza Raja Sri) Pushavati Alakh Narayan Gajapatiraj Maharaj Manya Sultan Bahadur Garu—Appellant.

v.

Secretary of State for India—Respondent.

Privy Council Appeal No. 55 of 1924.

(a) *Civil P. C.*, S. 115—*Contrary plea cannot be allowed in appeal so as to place opponent at a disadvantage—Practice—Inconsistent pleas.*

Where the whole controversy between the appellant's predecessor and the Government proceeded upon the admission or the tacit assertion of the appellant that he was in occupation of the lands or at all events that he took upon himself the burden of vindicating the action of his own lessees or sub-lessees in cultivating it, and where a period of nearly 25 years had elasped between the date when the Government first definitely intimated their claim to the lands in suit.

Held : that it is too late for the Board to entertain the contention that the lessees of the appellants who actually cultivated were liable for the assessment as Government had no opportunity of meeting the new plea.

A litigant who has all along maintained a position in support of one branch of his suit cannot be permitted when he fails upon this branch to withdraw from the position and assert the contrary

more especially when he thereby places his opponent at a great disadvantage. [P. 20, C. 2]

(b) *Alluvion and Diluvion—Mere submergence of ryoti land does not indicate relinquishment but right to retain continues only if rent is paid.*

Mere submergence of land held under ryotwari tenure does not indicate a relinquishment by the holder. If he wishes to retain his right to the submerged lands on the offchance of their being reformed in situ at some future date he must continue to pay year by year the assessment or rent which is due to Government. [P. 21, C. 1]

(c) *Madras Lands Encroachment Act* (3 *of* 1905), *S.* 16—*Section does not apply to lands reformed in situ which were relinquished by former ryots.*

Where, before submersion, lands were the property of the Government subject only to the rights of the ryotwari tenures which they had created, the effect of the relinquishment is to restore to the Government full freedom to dispose of what was originally their own. [P. 22, C 2]

W. H. Upjohn, K. V. L. Narasimham and *P. V. Subba Rao*—for Appellant.

L. DeGruyther and *Kenworthy Brown*—for Respondent.

Lord Salvesen.—This is an appeal from the High Ccurt of Judicature at Madras, dated the 18th March, 1920, which substantially affirmed a decree in judgment dated 31st December 1915, of the Subordinate Judge at Cocanada in a suit at the instance of the appellant against the respondent. This suit arose out of a dispute as to the ownership of a lanka in the river Godavari in the Province of Madras, the extent of which was estimated, at tho commencement of the suit, at 247 acres. The appellant is the owner of large estates, including the village of Kotipalli, situated on the banks of that river. The respondent is the Secretary of State for India, represented by the Collector of Godavari. It is common ground that in 1862 there existed a lanka which was Government property, and for the cultivation of which pattas were issued by the Government of the day to ryots connected with the village of Sanapalli, which lies in the neighbourhood of Kotipalli. This lanka was cultivated under these pattas for a number of years thereafter, and the Government assessment was duly paid by the cultivators. An example of such a patta has been produced in the present suit. It is dated in 1869, and indicates that erosion on a somewhat minute scale had already commenced to affect the area of the lands in question. Gradually the river encroached more and more upon the lands until, some time between 1880 and 1885, the whole of the lands had been totally submerged. After some years of total submergence a new lanka appeared in the river which by 1894, was of an area substantially the same as the lands in suit. At that time one Mudragada Nagayya, was a lessee of the Kotipalli lanka, under a lease granted by the owner of the estate, now represented by the appellant, the duration of which was 10 years from 1892. Nagayya took possession of the re-formed lands as forming an accretion to the Kotipalli lankas and paid rent to the appellant for these lands as well as for those originally embraced in his lease, and cultivated, through sub-lessees of his own. He did not, however, do so without objection and from 1897 onwards, petitions were presented by the ryots of the Government village of Sanapalli complaining to the Government that the suit lands formed part of the old Sanapalli village, and requesting the Government to recover them from the appellant and grant them back to the ryots. The Government directed a survey of the lands and, after a lengthy correspondence between the appellant and the Government, the latter claimed the suit lands as Government property. In 1911 the Government sent notices to the appellant under S. 7 of the Madras Act III of 1905. These were followed by a notice, dated 3rd February 1912, demanding payment of Rs. 74,971.86, representing the penalty and block rates for the years 1900 to 1911, during which the appellant was alleged to be in unauthorized occupation of the suit lands.

On the 30th July 1912, the appellant's predecessor-in-title instituted the present suit. In this he prayed for a judgment declaring his right to the 247 acres already referred to and to all accretions that might be made thereto, and for a permanent injunction against the Government restraining them from interfering with him in his ownership and enjoyment of the same by levying a penal assessment or by other steps. An immense amount of evidence was tendered at the trial, which it was stated occupied over 50 days of judicial time. The issue of fact, which was responsible for most of the time occupied was whether the re-formed lands in question were an accretion to the appellant's lands of Kotipalli or constituted a re-formation in situ of the lands which

had been formerly cultivated by the ryots of the Government. This issue of fact has been decided by both Courts against the appellant and is no longer in controversy.

The issues which still fall to be dealt with concern the legality of the penal assessment imposed on the appellant in 1911, and, as the case was presented to the Board, this assessment was challenged upon three grounds :—

(1) That an assessment, whether penal or otherwise, can only be imposed under the terms of this Act on "any person who shall unauthorizedly occupy any land which is the property of the Government." The appellant conceded that it must be now taken to be a fact that the land in suit is the property of Government and that it had been unauthorizedly occupied, but he maintained that the only persons upon whom the assessment could be levied were those in physical occupation of the land and not upon the owner of the estates of Kotipalli, who had merely granted leases of these lands under a bona fide belief that they formed accretions to his property. He founded this particularly upon S. 6 (1), which makes the crops or other produce of the lands liable to forfeiture, which provision, he contended, could only be applicable to the actual cultivator and not to the landlord who, by the very fact of granting a lease of the lands, had excluded himself from occupation. Whatever force there may be in this contention their Lordships do not propose to express any opinion upon it. Their Lordships hold that this contention is not open to the appellant in view of his actings before and throughout the litigation. The plaint contains the following passages: "The lanka in dispute has been in possession and enjoyment of the plaintiff's predecessors and plaintiff for several years." and in paragraph 8 the plaintiff also submits that: "Madras Act III of 1905 is not retrospective in its operation and does not entitle the Government to recover assessment from the plaintiff as he was in possession and occupation long prior to the coming into force of Madras Act III of 1905."

Not merely is there no reference to the construction which is now proposed to be put upon the Act in the plaint (which, indeed, in terms directly negatives the view now presented), but there is no trace of the contention being tabled throughout the voluminous proceedings in the Courts below. Even the appellant's case, although it is directed entirely to the legality of the penal assessment, does not contain a challenge of it upon this ground. There may have been occasions when the Board have entertained an argument on a pure question of law, although it has not been presented in the lower Court, where all the facts on which the contention depended had been definitely ascertained, but the objection to doing so in the present case goes very deep. The whole controversy between the appellant's predecessor and the Government which preceded the actual imposition of the penal assessment proceeded upon the admission or the tacit assertion of the appellant that he was in occupation of the lands, or, at all events, that he took upon himself the burden of vindicating the action of his own leesees or sub-lessees in cultivating it. Had this point been at any time mooted the Government would have had an opportunity of considering upon whom the notice of assessment which they ultimately sent to the appellant should have been given, and upon whom the penal assessment should have been levied. After a period of nearly 25 years has elapsed between the date when the Government first definitely intimated their claim to the lands in suit, their Lordships are clearly of opinion that it is too late for the Board to entertain this contention. A litigant who has all along maintained a position in support of one, and in this case the more important, branch, of his suit cannot be permitted, when he fails upon this branch to withdraw from the position and assert the contrary, more especially when he thereby places his opponent at a great disadvantage. There could be no clearer case for the application of the doctrine of estoppel owing to the conduct of the litigant.

(2) The second ground of attack by the appellant is based upon S. 2 of the Madras Act III of 1905. By that section all lands, wherever situated, are thereby declared to be the property of the Government, subject to the large exceptions enumerated under five heads which expressly preserve private rights. The exception founded on is contained in sub-S. (c), which exempts from the operation of the clause all lands which are the property "of any person holding under ryotwari tenure . . or in any way

subject to the payment of land revenue direct to Government." The respondent conceded that, before the submergence of the lands in suit, they came within this exception. He also conceded that, after a durkhast is made and a patta granted by Government, the interest of the ryot holding under this form of tenure is permanent, hereditary and transferable, that no ejectment at the instance of the Government is competent for arrears of rent, and that such arrears can only be recovered, as in the case of all Government revenue, by sale of the property held under this tenure. On the other hand, it is common ground that the holder of land under ryotwari tenure is entitled at any time to relinquish it, and the standing orders of the Board of Revenue applicable to Madras contain elaborate provisions dealing with this particular kind of tenure, and also with questions relating to the form of relinquishment, remission of rent and the like.

The High Court have dealt very exhaustively with the numerous points which have been argued on the question whether the relinquishment by the ryots of Sanapalli village, who held the pattas before their respective lands became submerged, can be inferred from the whole circumstances of the case, including a vast amount of documentary evidence. They drew the inference that it must be held as a fact that the ryots did relinquish their holdings (and thereby secured immunity from further assessment in respect of them) as and when the lands became submerged and no longer capable of cultivation, and that, when the lands were re-formed in situ, they were the property of the Government and at their absolute disposal. Their Lordships agree with the reasoning of the High Court, and they will only summarize some of the considerations to which they attach most weight.

Mere submergence of land held under ryotwari tenure does not infer a relinquishment by the holder. On the other hand, if he wishes to retain his right to the submerged lands on the offchance of their being re-formed in situ at some future date, he must continue to pay year by year the assessment or rent which is due to Government. There are instances referred to in the documentary evidence in which some of these ryots, whose lands were only partially eroded, continued to do so and so kept alive their rights; but in the ordinary case, the poor cultivator's interest is to relinquish the lands so as to escape paying the annual rent in the hope that, at a future date, should the lands be re-formed in situ, he may obtain a new tenure from the Government. On the other hand, according to the standing orders, all land for which a stipulated rent continues to be paid must be entered in the registers which the orders prescribe. The registers contain not merely an enumeration of all the lands in the district to which they apply in individual numbers, but they specify the acreage of the individual plots and also contain a record of the amount of rent leviable from each ryot in respect of the plot or plots he holds. In the case of Sanapalli village it has been found by concurrent findings of the Courts below that, when the land in question became submerged, it was not merely omitted from the ayacut or acreage of the village, but also from the gudikat or rental roll. The submerged land was likewise struck out of the pattas which constitute the evidence of title given to the holders under ryotwari tenure. These pattas are subject to revision from time to time when changes of circumstances occur; thus, if part of the land to which a ryot has right is eroded and relinquished by him, the rent corresponding to the part relinquished is deducted from the rent previously payable. In the case of the submerged lands the pattas appear to have been surrendered and, at all events, not one of them has been produced. It is common ground that none of the ryots who held pattas of the lands prior to submersion has paid any rent to the Government on these lands. These circumstances support the inference that the ryots concerned relinquished their holdings, which had, indeed, in the then existing circumstances, become valueless. The only possible alternative is that we are to infer that the Government, from humanitarian motives, had remitted the rent due by the ryots. Such remissions are competent under the standing orders, but they can only be made by the authority of the Board of Revenue, and the inferior officials, including the Collector, have no power at their own instance to make them. No evidence is adduced of any such remission having been asked or having been granted spontaneously. Further, in the petitions

presented to the Government in 1897 and onwards, although in one or two of them there are statements to the effect that the former ryots had not relinquished their holdings, there was no claim ever made by any individual ryot to the effect that an identifiable portion of the reformed lands was his property. On the contrary, the petitions proceeded on the footing that it was the duty of the Government to recover the lands in the illegal occupation of the appellant and to re-settle them upon the ryots of the village of Sanapalli without reference to the particular ryots who held the lands before the submergence. One suggested method of the Government so settling them was that the lands should be exposed to auction so that those ryots of Sanapalli who were prepared to pay most for the lands would obtain pattas from Government at the rents which they offered. The evidence to be derived from the petitions points to the ryots of Sanapalli village accepting the position that the Government was entitled to re-settle the lands, but urging that a preference should be given to the ryots of the village by whose inhabitants the lands had formerly been cultivated. A review of the whole facts disclosed by the evidence leads irresistibly to the conclusion that the lands in suit on their re-emergence from the river became once more the absolute property of the Government both under the Madras Act III of 1905, and at common law exactly as they had been in 1862 when the ryotwari tenures were first instituted.

(3) Lastly, it was maintained by the appellant that S. 16 of the Madras Land Encroachment Act III of 1905 exempted the lands in question from its operation. The section is in these terms :

"Nothing in this Act shall apply to any lands claimed by right of escheat, resumption or reversion until such lands have been reduced into possession by Government."

It was argued for the appellant that, as the lands had been throughout occupied by himself or his tenants, they had never been reduced into possession by the Government, and that they were lands claimed by Government within the meaning of the clause. Their Lordships are unable to take this view. They are clearly of opinion that these lands were not claimed by Government within the meaning of the section. Before submersion these lands were the property of the Government, subject only to the rights of the ryotwari tenures which they had created. The moment these rights were relinquished by the ryots the Government were free to deal with them as they pleased. The effect of the relinquishment was to restore to the Government full freedom to dispose of what was originally their own. The appeal on this ground also fails. It is right to note that the apparent hardship of the appellant being subjected to a penal assessment in respect of the unauthorized occupation of lands of which, on plausible grounds, he believed himself to be the owner, has in this case been largely, if not entirely, obviated by the judgment of the High Court declaring the levy illegal for the years prior to the coming into force of the Madras Act III of 1905. This part of the judgment has not been challenged by either party.

Their Lordships will, therefore, humbly advise His Majesty that the decision of the High Court of Judicature at Madras should be affirmed and the appeal dismissed with costs to the respondent.

Appeal dismissed.

Solicitor for Appellant—*H. S. L. Polak.*

Solicitor for Respondent—*The Solicitor, India Office.*

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(FROM MADRAS)

21st January 1926

LORDS DUNEDIN, SHAW AND BLANESBURGH AND SIR JOHN EDGE

Raja Rajeswara Setupati Avergal—Plaintiff—Appellant.

v.

Kamid Rowthen and *others*—Defendants—Respondants.

Privy Council Appeal No. 29 of 1924.

Madras Estates Land Act (1 of 1908), S. 12—Fees held on tree pattas—S. 12 does not apply—Full value of trees must be paid if trees are wrongfully cut.

If the trees are held on what may be called separate title, i. e., on a separate lease of trees as trees, S. 12 does not apply : [1 *M. L. W.* 881 *Appr.*] If in such a case the trees are wrongfully cut, the full value of the trees must be paid.

[P. 26, C. 1]

L. DeGruyther and *Kenworthy Brown*—for Appellar ..

K. V. L. Narasimham and *P. Subbarow*—for Respondent.

Lord Dunedin.—The plaintiff in the present set of cases is the Zamindar of Ramnad, an estate situated in the Presidency of Madras. The defendants are ryots who are tenants of the plaintiff in virtue of certain pattahs. The plaintiff complaired that the defendants had cut down trees belonging to him. The trees were palmyra trees, which yield a juice which is tapped from the trees, and, as it makes an intoxicating liquor, has a commercial value. The plaintiff raised separate actions against each alleged wrongdoer in the Court of the District Munsif of Manamadura. The pleading in the case was in the highest degree unsatisfactory and was, as will appear hereafter, the real cause of the unsatisfactory condition of the case on the appeal before this Board. It may be here parenthetically explained that the ordinary position of a ryot is that he is in possession of the land for agricultural uses, but that he is not entitled to cut down trees. But in Madras there is special legislation dealing with the subject, namely, the Madras Estates Land Act, being Act I of 1908. Section 12 of that Act is in the following terms:

"Subject to any rights which, by custom or by contract in writing executed by the ryot before the passing of this Act, are reserved to the landholder, every occupancy ryot shall have the right to use, enjoy and cut down all trees now in his holding, and in the case of trees which after the passing of this Act may be planted by the ryot or which may naturally grow upon the holding he shall have the right to use, enjoy and cut them down, notwithstanding any contract or custom to the contrary."

In the definition clause, S. 3, sub-S. 6, "occupancy ryot" is defined:

"'Occupancy ryot' means a ryot having a permanent right of occupancy in his holding."

Then sub-S. 15 defines "ryot":

"'Ryot' means a person who holds for the purpose of agriculture ryoti land in an estate on condition of paying to the landholder the rent which is legally due upon it."

Sub-section 3 defines "holding":

"'Holding' means a parcel or parcels of land held under a single pattah or engagement in a single village."

Now, what the plaintiff ought to have said in each case was in plain terms that the defendants were not persons to whom S. 12 applied, because they were lessees of the trees in terms which made them usufructuaries of the trees, but did not give them the trees as a mere appanage of land let to them, and then to have averred that they had wrongfully cut down the trees. Instead of this, what he did was this (the averments in one case may be taken as a sample of the whole as they are all in terms practically identical). After averring the cutting down of the trees, he said:

"The defendant, who is bound according to the custom of the village and Zamin and according to law to pay compensation to the plaintiff for the said trees, has not done so."

To this the defendant (again taking one case as a sample) replied first, by denying that the trees had been cut, and, second, by denying the custom alleged. It is thus evident that, so far, the real question as to whether the Act of 1908 applied had not been properly raised. It is true that it had been alleged that the pattah was a tree pattah. But that allegation had not been pressed home by the appropriate plea that the result was that the Act did not apply. On the contrary a custom of payment had been set up, which exactly fits the exception mentioned in the opening words of S. 12. The parties then went to trial in the Court of the District Munsif of Manamadura. He delivered a judgment. In this judgment he found as a fact that the trees had been cut. He then found in law that, as a tirva or rent was paid for the trees, the trees belonged to the Zamindar and that, therefore, at common law, apart from custom, if the tenants cut the trees, they must pay damages. He then went on to deal with the averment of custom as if it had been an averment of custom, not as to right of payment, which it obviously was, but as to scale of payment, which it obviously was not. He then found that there was no universal custom proved as to scale, and thus it being left to himself to determine the figure of damages, he determined them as 25 years' purchase of the annual rent value of a tree. He did not in his judgment make any mention of the

Act of 1908. He granted decrees in all cases for a sum representing the 25 years' purchase of the rental value of the trees cut.

From this judgment an appeal in the form appropriate to such a case from the Munsif's Court, i. e., civil revision petition, was preferred to the High Court of Madras. This was disposed of by Moore J. He, in his judgment, after stating the claim, says this :

"These Civil Revision Petitions arise out of a number of small cause suits which were brought by the petitioner, the Raja of Ramnad, to recover from his tenants the value of palmyra trees on their holdings which had been wrongfully cut and appropriated by the tenants. The value of the trees was claimed at the rate of Rs. 3 per tree in one village and Rs. 6 per tree in the other two villages. In C. R. P. No. 1252 of 1918 the petitioner is the defendant in one of the small cause suits. It was alleged in the plaint that the defendants, who were bound according to the custom of the village and Zamin, and according to law, to pay compensation to the plaintiff for the trees cut, had not done so. The defendants denied having cut the trees and the custom alleged in the plaint and claimed the ownership of the trees. They further contended that the value claimed was excessive. The District Munsif found that the alleged cutting was true and that the value claimed was proper for the trees, viz., Rs. 3 and Rs. 6, and that the holding consisted of trees which were assessed to tirva. On the third point, viz., 'whether the alleged usage was true and what relief was plaintiff entitled to ' the District Munsif held that the proper amount of compensation would 'ordinarily' be the capitalized value of the annual tirva, or twenty-five times the annual tirva. The findings on the first two points being in plaintiff's favour, the only question for decision in these petitions is whether the method of calculating compensation adopted by the lower Court is correct." He then mentions the contention of the defendants under S. 12 of the Act, but he says no more about it. In other words, he seems to stick to his view that the only question left was the valuation question. He criticizes unfavourably the Munsif's view of the 25 years' purchase of the rental value of the trees as the proper measure of damages, a result which, he says, he cannot extract from the proof as to custom, and he then remits the case to the inferior Court for findings on the following points :

"1. Whether there is a valid custom entitling the landholder to claim compensation for palmyra trees cut by the defendants, without the permission of the landholder. (2) If so, what is the compensation payable by the defendants ?

The case then went back to the lower Court. This time there was a different Munsif. He pronounced a very clear judgment. He said :

"I have to give findings on the following two issues :

(1) Whether there is a valid custom entitling the landholder to claim compensation for palmyra trees cut by the defendants without the permission of the landholder.

(2) If so, what is the compensation payable to the defendants ?

2. Issue No. 1.

"I have heard Mr. T. C. Srinivasa Ayyangar, pleader for plaintiff, the Raja, at great length. I have approached the question in the light of the observations contained in the judgment of High Court. I would find the issue in the negative.

"Issue No. II requires no finding in view of my finding on Issue No. 1."

He also takes no notice of the Act, but assumes that he had been told that the Zamindar's only right to compensation rests on a custom to receive it.

On the return to the High Court of the findings, the Zamindar presented a note of objections. In these objections he, for the first time, raised definitely the true case as to the application of the Act :

"4. The District Munsif erred in throwing the onus of proof on the plaintiff.

"5. The District Munsif erred in assuming that the Estates Land Act had any application to the present case."

The case was then resumed by the High Court with the returned findings and the objections thereto. They, in all the cases, set aside the decree of the lower Court and dismissed the suits. They granted the respondents their costs in the High Court ; in one case they directed that there should be no costs in the lower Court, but in all the other cases they were silent as to the costs in the lower Court. The opinion of the

learned Judge who delivered the leading judgment begins with the statement that "the counter-petitioners are the tenants of land on which trees were and are standing." He then goes on to say :

"The remaining questions for consideration are :

(1) Whether the District Munsif was right in allowing as damages, not the value of the trees cut, but only 25 times the tirva payable ; and

(2) whether plaintiff (petitioner) is legally entitled to claim damages at all ; in other words, whether the tenants have got absolute right to deal with the trees in any manner without being liable for any damages for so dealing. So far as the first question is concerned, I might at once say that if the tenants are legally liable for damages, they ought to have been made to pay the market value of the trees and not 25 times the tirva. But, on the second point, I am of opinion that the defendants are not liable for any damages at all."

After dealing with an argument which seems to have been presented that the right to cut down trees does not include the right to appropriate them, which he negatives, he then comes to the true question of the case. This portion of his judgment must be quoted in full and is as follows :

"Lastly it was argued that the defendants are not ryots holding lands for agricultural purposes, but that they are merely persons who have been allowed to enjoy the produce of the trees on payment of some remuneration to the landholder, which remuneration does not fall within the definition of rent in the Estates Land Act, and that therefore, S. 12 has no application at all. The muchilikas, Ex. E series, executed by the tenants do not, in my opinion, support this contention. They are all ordinary muchilikas of the kind usually executed by ryots holding land under the Zamindar. The only special feature of these muchilikas is that the fixed rent payable by the ryot who holds the land, calculated on the area of the land, which is described as regai punja, is increased by an amount varying with the number and size of the trees in the holding. Under the definition in Cl. 1 of S. 3 of the Act, agriculture includes horticulture, and the fact that the rent for the land varies with the number of trees standing thereon does not make the ryot a mere licensee enjoying the produce of the trees under the landlord. He is the occupancy ryot of the land itself with the trees thereon, though paying varying rents according to the number of trees existing on the land. (We were told in the course of the argument that the assessment was varied once in six years, according to the number of trees at the time of the periodical settlement.) Reliance was, however, placed on the decision in *Murugappa* v. *Ramanathan Chettiyar* (1), for the contention that these were not muchilikas for the land held by an occupancy ryot, but that these are agreements for payment of vari or tax payable in respect of the trees held on tree pattas. We have not before us the muchilika executed in that case and if, on a consideration of the terms of that muchilika, it was held that it was an agreement by a licensee to pay tirva for enjoying the produce of trees without any kudiwaram right in him in the land on which the trees stood, I accept (if I may say so with respect) the correctness of that decision. But, as I said, I am satisfied in this case that the land itself on which the trees stand is held on patta, though the rent payable for that land varied with the number of trees standing on it, owing to a certain amount (varying according to the number of trees) being added to the invariable rent based on the extent of the land. Therefore, the Estates Land Act does apply to the relationship of landlord and tenants in this case."

Spencer, J., concurs and says as follows :

"The suggestion that S. 12 of the Madras Estates Land Act does not apply in this case was put forward on the assumption that the pattas in the suits were purely tree pattas and not pattas for land. But a reference to the muchilikas on the record shows that this is not the case. I agree with my learned brother both on the general question as to the effect of S. 12 of the Madras Estates Land Act, and as to the order to be passed in particular cases."

It is, therefore, quite clear that the case has been decided upon the ground that the ryots were holders of land on which trees stood, that they had cut trees standing on their own holdings, and that they had the right so to cut them in respect of S. 12 of the Madras Act. It is clear also that, had the tenants' right to

(1) [1915] 1 L. W. 881.

the trees not depended on the fact that the trees stood on their holdings, but had depended on a separate lease of the trees as trees, whether trees stood on their holdings or on the holdings of other persons, the learned Judges would have come to the opposite conclusion and would have held that the damages for illegal cutting were to be measured by the value of the trees so cut and, lastly, it is clear that the reason that they held that the trees in question were held as part of the land holdings and not in respect of a separate title was not in respect of any local knowledge as evidenced by proof led, but because they determined the fact as a matter of construction of the leases in question of which the muchilikas or tenants' counterpart were produced. Their Lordships are in entire concurrence with the learned Judges as to the result in law if the trees are held on what may be called separate title. In such a case S. 12 of the Madras Act does not apply, and they think that the case cited of *Murugappa* (.) was rightly decided. They think also that the result that follows was rightly affirmed by the learned Judges, i. e., that the full value of the trees which had been illegally cut must be paid for.

But their Lordships are quite unable to concur with the reasons of judgment on the further point. From the reference made to the Ex. E series of the muchilikas it would seem as if the learned Judges had exclusively directed their attention to a case where there is both land and trees which are included in the lease. In one case at least, by a comparison and reference, perhaps it is possible to infer that some at least of the trees are on the land let, but that is not the case with all. Moreover, there are a large number of muchilikas which deal with trees and trees alone. How can it be possible to deduce from this, as a matter of construction, that these trees are on a land holding of the person to whom the tree right is granted? How can it be told that he holds any land at all? It is matter of common knowledge —and the case already mentioned is an instance—that, in view of the known use of the palmyra tree, leases of what are only the usufruct of the trees as such are granted. Many of the muchilikas produced point to such a lease. But in the judgment they have all been compelled to suffer the fate of the muchilika, which is above mentioned. If the judgment stands it would be very far reaching and in granting leave to appeal to the King in Council, the learned Judges seem fully to appreciate that fact. In their Lordships' view, the facts on which the case depends have not been properly found one way or other.

There are just three situations in which palmyra trees may be held:

1. They may simply be growing on land which is held by a ryot, though no mention of trees be made in any lease.

2. They may be growing on land held by a ryot, but they may be let as a separate entity in his lease.

3. They may be let to a person on whose land they do not grow.

Assuming trees to be cut without the leave of the landholder the position in law as regards 1 and 3, seems simple.

As regards 1, S. 1 of the Act of 1908 applies and the landholder has no claim.

As regards 3, S. 12 of the Act of 1908 does not apply and the landholder has a claim for the full value of the trees so cut.

As regards 2, their Lordships will not express an opinion because, as yet, there is no determination of the question so far as they know, by the Courts in India, and they would wish such a determination before coming themselves to a conclusion.

But as regards the cases in this appeal there are no materials for ascertaining positively in regard to the 30 separate cases in which of the three categories each case falls. They cannot be taken in a block. Each case stands on its own facts. Their Lordships have, therefore, come to the conclusion that these cases must go back to the Courts in India to determine on evidence of fact in each particular case into which category it falls and, in accordance with that determination, to pronounce or refuse decrees in each particular case. As regards costs, for the reasons stated in this judgment, their Lordships consider that the confusion into which the cases have fallen is largely due to the inadequate pleading of the plaintiff. At the same time the defendants ought not to have denied the cutting—a fact which has been determined against them. Their Lordships, therefore, think that the case should be remitted as aforesaid and the respondents should have the costs of the appeal

before this Board, and in each of the Courts below, except the costs of the original inquiry before the first Munsif; that, in that inquiry in the case of all defendants who denied cutting of trees; there should be no costs to either party; and that the costs of the future progress of the case should be determined by the Courts in India. They will humbly advise His Majesty to issue an order in accordance with these views.

Case remitted.

Solicitors for Appellant — *Chapman, Walker* and *Shephard.*

Solicitors for Respondents—*H. S. L. Polak.*

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* A. I. R. 1926 Privy Council 27

(FROM MYSORE)

26th January 1926

VISCOUNT DUNEDIN, MR. AMER ALI AND SIR ARTHUR CHANNELL

Thomas Charles William Skipp—Appellant.

v.

Lilian Mildred Kelly—Respondent.

(and a Cross Appeal)

Privy Council Appeal No. 152 of 1924.

* (a) *Contract Act, S. 23—Void promise.*

A promise by a Christian to marry another when the person is already a married person is a void promise. [P 27 C 2]

* (b) *Damages—Breach of contract to marry—Fixing date of marriage after parties are free to marry implies promise to marry and is not ratification of prior agreement to marry which was void as parties could not contract valid marriage,*

Where a man agreed to marry a woman (plaintiff) during divorce proceedings between her and her husband, and after the divorce proceedings had gone through, and consequently the plaintiff became a free woman, the defendant (man) bought her a ring and actually arranged the date on which they were to be married :

Held : that when persons fix a day for their marriage it may be inferred that there is a promise of marriage. And one is not bound to take it as a ratification of a contract which in itself is void, and which, therefore, in law cannot be ratified by anything that can be subsequently done. [P 27 C 2; P 28 C 1]

(c) *Damages—Measure of damages is not interfered with unless clearly wrong.*

Measure of damages fixed by the lower Court in India will not be interfered with unless the measure is very clearly wrong. [P 28 C 1]

E. Labouchere Thornton—for Appellant.

R. A. Yule—for Respondent.

Viscount Dunedin.—This is an action by a lady for breach of promise of marriage against the defendant. The case was tried by the District Judge of the Civil and Military Station, Bangalore. He formulated the following issue: "Was there a valid contract of marriage?" Their Lordships think perhaps the expression there used ought rather to have been whether there was a definite promise of marriage, because the expression "contract of marriage" is usually used in another sense, but it is quite plain what he actually meant. He found that issue in favour of the plaintiff. He then went on with another issue: "If there was such a valid contract, did the defendant or the plaintiff break it either expressly or impliedly?" He found that issue also in favour of the plaintiff. When the case went to appeal the learned Resident in Mysore found that the engagement did subsist up to the time of the defendant's marriage with another lady, and, therefore a breaking of the contract was necessarily inferred.

The point was taken by the plaintiff, the respondent in the main appeal, that these two findings, being concurrent findings of fact, cannot be interfered with, and, to a certain extent their Lordships think that is true, but at the same time the defendant put forward what he considered a legal plea, because he said that upon a proper consideration of the promise which had been held proved, that promise was not a promise which could be recognised in law because it was merely a ratification of a void promise which had been made before.

The plea arises upon these facts. It is undoubtedly the case that the defendant first promised to marry the plaintiff when, as a matter of fact, she was a married woman. It was understood between them that a divorce was going to take place, and a divorce afterwards did take place; but it has been quite well settled, and no one can doubt the law upon the subject, that a promise made in such circumstances is a void promise. Nevertheless, the parties considered themselves as engaged persons; behaved as engaged persons, and, though their Lordships need not go through the various circumstances of the case, it is certain that after the divorce proceedings had gone through, and consequently the plaintiff became a free woman, the defendant

bought her a ring and actually arranged the date on which they were to be married.

The legal point is whether, from circumstances like that, it is possible to infer what really is in law a new promise to marry. There is no difficulty as to consideration because the promise to marry is sufficient consideration. It seems to their Lordships that the case is in precisely the same position as the case of *Ditcham* v. *Worrall* (1), and their Lordships cannot do better than read a few words from the judgment of Lindley, J. (as he then was) in that case. He says at page 414 :

"Unless, therefore, the statute" (he is speaking of the Infants Relief Act) "forbids such an inference from their conduct, it appears to me that the jury might have found, and ought to have found, that there was a promise by the defendant after he came of age to marry the plaintiff on the day ultimately fixed for the marriage, and not a mere ratification of a promise made previously to marry at a day to be thereafter fixed,"

and then he gives reasons for saying that that opinion is warranted by the decision of the House of Lords in the case of *De Thoren* v. *Attorney-General* (2). Their Lordships entirely agree with that reasoning. It seems to them that when persons fix a day for their marriage it may be inferred from this that there is a promise of marriage and one is not bound to take it as a ratification of a contract which in itself is void, and which, therefore, in law cannot be ratified by anything that can be subsequently done.

Accordingly their Lordships think that the learned Judges here on the facts, which cannot be controverted because they are concurrent findings, came to a conclusion which they were perfectly warranted in law in coming to.

Although their Lordships did not stop the appellant from reading the evidence they really think that the examination of the evidence as to how the parties behaved afterwards was scarcely relevant in view of these two findings, but, as it has been gone into, their Lordships would wish to say that they think that the learned Resident has taken a perfectly correct view of what happened between these two parties. They had lover's quarrels, each was unwilling to take the first step of reconciliation, and so they drifted on with periods of separation, but after a time came together in India when this renewed promise was made.

Now the learned District Judge held that the matter was made worse by what he considered was a proof of seduction. That proof of seduction was rejected, and rejected their Lordships think, upon perfectly right grounds, by the learned Resident on appeal. The result was that the learned Resident, on appeal, reduced the damages from Rs. 50,000 to Rs. 15,000.

Their Lordships, whatever their own views would have been if they had been trying the case, would never think of interfering with a measure of damages which had been fixed by a learned Judge unless they saw that there was something very clearly wrong with the figure which he had fixed upon, and, therefore, as regards this part of the judgment also they do not consider it right that it should be altered.

Their Lordships will, therefore, humbly advise His Majesty that the main appeal should be dismissed, and that the respondent should have such costs as a pauper can obtain, because she has been allowed to defend in forma pauperis, and, as her cross-appeal has not been insisted upon, it should also be dismissed, and that there should be no costs to either party in that cross-appeal.

Appeals dismissed.

Solicitors for Appellant—*Josselyn & Elwes*

Solicitor for Respondent—*H. S. L. Polak.*

(1) 5 C. P. D. 410=49 L. J. C. P. 668=29 W. R. 59=44 J. P. 799=43 L. T. 286.

(2) 1 App. Cas. 686.

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FROM RANGOON

28th January 1926

VISCOUNT DUNEDIN, MR. AMEER ALI AND SIR ARTHUR CHANNELL

(*Maung*) *Kyi Oh* and *another*—Appellants.

v.

Ma Thet Pon—Respondent.

Privy Council Appeal No. 181 of 1924.

(a) *Practice—Pleadings in moffusil are not to be scrutinized with strictness.*

In a case from a District Court in Burma pleadings, and the whole conduct of the case can scarcely be scrutinized with the strictness with which a case would be scrutinized in England. [P. 29, C. 2]

(b) *Burmese Law—Inheritance.*

Under the Burmese Law the surviving husband of a person who ex hypothesi is the then surviving daughter is treated as one of the heirs of the father. [P. 30, C. 1]

(c) *Practice—Judgment—Mistake of fact committed by High Court should be corrected in the High Court and not in Privy Council.*

If a judg neat is given out in which there was an absolute mis-statement of fact on a perfectly plain question it would be the duty of the person aggrieved to go to the High Court and say: "Your judgment is vitiated by an obvious error on a pure question of fact;" and to atte npt at any rate before the High Court to put it right. [P. 30, C. 1]

(d) *Practice—Disbelief in witness owing to his demeanour is generally not upset by appellate Court.*

Where the Judge of first instance disregarded testimony upon the demeanour of the witness and said that he thought from demeanour that he was lying, or that the corroboratory witness was lying, the Court of appea would be loath to upset the finding of fact, but not where he is disbelieved on the inherent probabilities of the story. [P. 30, C. 2]

E. B. Raikes—for Appellants.

Gerard S. Sanders and *Prince Fateh Singh*—for Respondent.

Viscount Dunedin.—The land, the contention as to which is the matter of this suit, belonged originally to one U Laik, who died somewhere about the year 1893. He left the land burdened with a mortgage. U Laik was survived by a large family; to most of the family there is no reason that any particular reference should be made, but the youngest daughter married U Bauk. That lady died and U Bauk married again. The lady had before her death a daughter called Ma Thet Pon, and Ma Thet Pon is the plaintiff in the present suit. After her death and his second marriage U Bauk had certain children, and one of them and her husband are the administrators of U Bauk's estate and are the first two defendants in the present suit. In the year 1909 there was brought a redemption suit to redeem the lands from the mortgage with which they had been encumbered by U Laik during his life. What happened in that redemption suit was that the money which was paid into the Court to effect the redemption was paid in by the hand of U Bauk. The decree for redemption decreed the land in the name of the heirs of U. Laik, but there is a controversy as to whether U Bauk immediately entered into possession or whether the heirs entered into possession. At any rate, U Bauk was eventually in possession, whether as agent or on his own account, as has been said, is a matter of controversy, and at the time of the institution of this suit U. Bauk was in possession. The suit as instituted by Ma Thet Pon is in right of her mother Ma Saw Ma, and, as such as heir of U. Laik. She avers, and a certain agreement has been referred to in the judgment of the High Court and put in before this Board which bears out her averment, that the other heirs, that is to say, the elder brothers and sisters of her mother, Ma Saw Ma, had agreed to renounce their rights upon certain terms. She says that, first of all, she is the heir, and, secondly, that it was her money which effected the redemption, although the actual hand that paid the money into Court was that of her father U. Bauk. The defendants, who are the administrators of U. Bauk, say that U. Bauk himself was an heir, in right of his first wife, and it was his own money which he paid for the redemption. It is apparent that one of the crucial facts in this matter is, Was U. Bauk an heir of U. Laik or not? Their Lordships recognize that in a case from a District Court in Burma pleadings, and, indeed, the whole conduct of the case, can scarcely be scrutinized with the strictness with which a case would be scrutinized in this country. That allowances must be made is abundantly clear from the history of the proceedings in this case, because it is apparent when the pleadings are looked at that really both the plaintiff and the defendants floundered as to their real case, and that the Court quite rightly took upon itself to straighten out

the whole matter and try to discover what the real question between the parties was.

As their Lordships have already said, one crucial fact is, Was U. Bauk an heir or was he not? That depended necessarily upon whether his first wife, Ma Saw Ma, survived or did not survive her father. If she did not survive her father, then U. Bauk had no status as an heir at all; if she did survive her father then the Burmese Law is that U. Bauk, being the surviving husband of a person who ex hypothesi is the then surviving daughter, is treated as one of the heirs of the father. Their Lordships cannot say that the matter is altogether satisfactory in this respect, but it is the fact that the High Court, setting forth the family of U. Laik, in the very next sentence say that his family comprised a daughter, Ma Saw Ma, who predeceased him, and then they go on to say that in the redemption suit U. Bauk with another person were unnecessarily made plaintiffs' since their respective spouses had died before they were within reach of the inheritance. It has been very properly argued by Mr. Raikes that there is no real proof of this statement, and he has also called the attention of their Lordships to the fact that in the redemption suit and indeed in this plaint it was alleged by the plaintiff that when U. Laik died he was succeeded by his children, among whom Ma Saw Ma is mentioned as one. Notwithstanding that their Lordships feel that, when there is a distinct statement by the High Court that U. Laik's daughter, who was U. Bauk's wife, had predeceased him, they cannot go behind that statement. The High Court was in possession of facts which are not before their Lordships; they certainly had before them whatever admissions counsel may have made in the course of the case, and their Lordships feel that if a judgment was given out in which there was an absolute mis-statement of fact on a perfectly plain question it would have been the duty of the person aggrieved to have gone to the High Court and said: "Your judgment is vitiated by an obvious error on a pure question of fact"; and to have attempted, at any rate, before the High Court, to put it right.

There is another matter also: It is quite clear that, taking a strict view of the law, if the defendants showed that this statement was completely wrong, they went a long way towards winning tha case, and, therefore, in the ordinary and proper conduct of the case it would have been one of the things that one would have supposed the defendants' counsel would have tried, before all other things, to bring out, that U. Bauk had real possession as an heir. When one comes to the depositions of the witnesses in the case and the other documentary evidence, there is really nothing on which an actual determination can be founded. There are certain calculations, based upon a calculation as to age, on which one may come to certain conclusions; but there is nothing positive in the material before their Lordships on which they can come to a conclusion as to the proper date.

In those circumstances, their Lordships feel that they are really bound to take the fact as stated by the High Court that U. Laik's daughter had predeceased him. If that is so, then U. Bauk was not an heir, and it is in the complexion of that fact that he was not an heir that the rest of the evidence must be looked at. U. Bauk was then, so to speak, a volunteer. It is equally possible that U. Bauk redeemed the mortgage with his own money or with money which was given him by Ma Thet Pon, and here, of course, there is the actual testimony that was given about the advance of the money by Ma Thet Pon. U. Bauk is dead, and so unfortunately their Lordships cannot have his evidence; but not only does Ma Thet Pon depose quite clearly that she gave the money, but there is also the testimony of one other witness. It is quite true that the learned Judge of first instance disregarded that testimony, and, if he had based his judgment upon the matter upon the demeanour of the witness and said that he thought from her demeanour that she was lying, or that the corroboratory witness was lying, it would be another instance of what has so often been said, that a Judge who sees the witness is in a better position than a Court of appeal, which does not; but that is scarcely what the learned Judge of first instance said. He did not seem to go so much upon the demeanour of the witness as upon what may be called the inherent probabilities of the story: the inherent probabilities of the story are taken up by

the High Court, and their Lordships can only say that they think the High Court has commented on those inherent probabilities in a way that commends itself to their Lordships' judgment.

Upon the whole matter, therefore, their Lordships do not think that a case has been made out to disturb the judgment of the High Court. That, after all, is a question for a Court of appeal always, and it is especially a question for a Court of appeal such as their Lordships' Board, which is a long way from the place and without any knowledge of the local circumstances.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for Appellants—*Sanderson, Lee and Co.*

Solicitors for Respondent — *Bramall and Bramal.*

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FROM PATNA

16th February 1926

VISCOUNT DUNEDIN, LORD BLANESBURGH AND SIR JOHN EDGE

Sourendra Mohan Sinha and *others*—Appellants.

v.

Hari Prasad Sinha and *others*—Respondents.

(*Cross-appeals.*)

Privy Council Appeal No. 136 of 1924, from Patna Appeals Nos. 24 and 25 of 1922.

(a) *Privy Council—Practice.*

Privy Council vary their order in Council, only under exceptional circumstances. [P 31, C 2]

(b) *Civil P. C., O 45, R. 15 (1)—Where party with order in Council refuses to lodge the order, opponent can move High Court with certified copy.*

Where a party having order in Council is delaying or refusing to lodge the order, opponent can apply to the High Court with a certified copy of the order and ask for a summary order on the party to lodge the order which had been entrusted to him so that execution might follow in terms of the judgment of the Board. [P 31 C 2]

S. Hyam—for Appellants.

G. R. Lowndes and *E. B. Raikes*—for Respondents.

Viscount Dunedin.—This is an application to vary the order in Council The order has been already passed (vide *A. I. R.* 1925 *P. C.* 280) and it could only be under exceptional circumstances that their Lordships could humbly advise that another order should be passed.

In the suit judgment was given for the plaintiffs against the defendants for a certain sum.

On appeal to the King in Council their Lordships humbly advised His Majesty to reduce substantially the sum for which judgment had been given, and to make the sum still decreed payable eight months after the date of the receipt of the order by the High Court.

The defendants having been substantially successful in the appeal, the order in Council in accordance with the ordinary practice was issued to them, and in ordinary course ought to have been lodged by them in the High Court. They have not, however, done so, and the plaintiffs cannot, therefore, so far get execution. Hence this application. The plaintiffs and petitioners have not sufficiently adverted to O. 45, R. 15 (1) of the First Schedule to the Code of Civil Procedure. When they found that the defendants were delaying or refusing to lodge the order they could have applied to the High Court with a certified copy of the order and asked for a summary order on the defendants to lodge the order which had been entrusted to them so that execution might follow in terms of the judgment of this Board. This they, can still do. Their Lordships, therefore, cannot advise His Majesty to grant the prayer of the petitioners ; but as they are clearly of opinion that it was the duty of the defendants in the ordinary course to lodge the order there will be no costs allowed on the petition.

Prayer not granted.

Solicitors for Appellants — *Barrow, Rogers & Nevill.*

Solicitors for Respondents—*Watkins & Hunter.*

✻ A. I. R. 1926 Privy Council 32

FROM CALCUTTA

10th July 1925

VISCOUNT FINLAY, LORD BLANESBURGH, SIR JOHN EDGE AND MR. AMEER ALI

Mahomed Ali Mamoojee—Appellant.

v.

Howeson Brothers—Respondents.

Privy Council Appeal No. 150 of 1924.

✻ *Contract Act, S. 130—Surety for Receiver appointed by Court—Continuing guarantee cannot be discharged by notice—Consent of Court is necessary.*

Notwithstanding S. 130, which holds that a continuing guarantee may at any time be revoked by the surety as to future transactions by notice to the creditor, it is not competent to the surety for a Receiver, who has been appointed an officer of the Court, to discharge himself merely by notice to the decree-holder, or other person at whose instance or for whose benefit the Receiver was appointed : 29 *Cal.* 68, *Expl* A person does not become a surety till he has been accepted as such by the Court and he cannot discharge himself without the consent of the Court.

[P 33 C 1]

De Gruyther and *Kenworthy Brown*—for Appellant.

A. M. Dunne and *Douglas McNair*—for Respondents.

Facts.—These will be clear from the judgment of the High Court given below in Appeal No. 5 of 1923, decided on 8th May 1923.

Asutosh Mookerjee and Rankin, JJ.—This is an appeal from an order made by Mr. Justice Greaves against a surety under S. 145, Civil P. C. The facts material for the determination of the questions in controversy are really not in dispute and may be briefly stated.

On the 29th July 1920, a preliminary decree was made in a mortgage suit instituted by Howeson Brothers against the. Harveys On the same day, one of the defendants, W. S. G. Harvey, was appointed Receiver. On the 9th September 1920, the appellant, M. A. Mamooji, became surety for the Receiver. The surety-bond stated as follows :

" If the said W. S. G. Harvey do and shall duly account for all sums of moneys which shall and have come into his hands as such Receiver as aforesaid and file all papers and his half-yearly accounts before a Judge of this Court, as directed by the said decree of the 29th July 1920, and do and shall duly and faithfully perform the duties as such Receiver as aforesaid, according to law, and in all respects discharge the duties and obligations which shall devolve upon him as such Receiver as aforesaid, and obey and carry out the said order and all other orders and directions which may hereafter be made and given by the said High Court in the said mortgaged properties, then and in such case the above written bond or obligation shall become void and be of no effect ; otherwise the same will remain in full force and virtue."

On the 22nd July 1921, Mamooji made an application to be released from his obligations and covenants as stated in the security bond. This application was heard by Mr. Justice Greaves on the 5th August 1921, but no order was made in favour of the petitioner. On the next day the solicitor for Mamooji wrote to the plaintiff and stated that as Harvey had not carried out his agreement with Mamooji, Mamooji did not wish to continue to guarantee the acts of Harvey in whom he could not any longer place confidence. Mamooji accordingly desired to be released from further liability. The letter, however, stated that Mamooji would hold himself under the bond already executed for all acts and omissions of Harvey till such date as he might be released from further acting by order of the Court which he would then seek to obtain. On the 10th August 1921, a similar letter was addressed by the solicitor to the plaintiff. The letter repeated that Mamooji did not wish to act any further as surety for Harvey and requested the plaintiff to apply to the Court for the removal of Harvey and for the appointment of the Court Receiver in his place. On the 2nd December 1921, the solicitors for the plaintiffs wrote to the solicitors for Mamooji with the result that on the 12th December 1921, Harvey was removed and Martell was appointed Receiver in his place. On the 19th May 1922, the Referee found that a sum of Rs. 32,806-14-3 was due from Harvey. On the 15th July 1922, an order was made by Mr. Justice Greaves on Harvey to pay this sum to Martell. Harvey was apparently unable to make the payment and on the 7th August 1922, an application was made to recover the sum from Mamooji. This

application was dismissed on the 18th August 1922, as the bond which stood in the name of tho Registrar had not been assigned to the Receiver. The assignment was effected on the 24th August 1922, and thereafter, the present application was made under S. 145, Civil P. C., on the 5th December 1922, to recover the sum from the surety. The position taken up by the surety was that he had effectively discharged himself by the notice he had given. This contention was overruled by Mr. Justice Greaves and an order was made against the surety in terms of S. 145, Civil P. C. In the present appeal, we have been invited to consider the propriety of this order.

On behalf of the surety, reliance was placed upon S. 130 of the Indian Contract Act and the decision in *Rajnarain Mukherjee* v. *Phulcoomari Debi* (1). This decision was doubted by the Madras High Court in *Subrayya* v. *Ragammall* (2), which was accepted by the Allahabad High Court as a correct exposition of the law in *Kandhya Lal* v. *Manki* (3). We are of opinion that the view taken by Mr. Justice Greaves is correct.

In *Rajnarain* v. *Phulcoomari* (1), it was ruled that S. 130 of the Indian Contract Act enabled a person who had become surety in an administration proceeding to discharge himself by suitable notice. The judgment of Sir Francis Maclean, C. J., was cautiously phrased and does not support a more extended rule, although the language used by Mr. Justice Banerjee seems to go further. We are of opinion that notwithstanding S. 130, which holds that a continuing guarantee may at any time be revoked by the surety as to future transactions by notice to the creditor, it is not competent to the surety for a Receiver, who has been appointed an officer of the Court, to discharge himself merely by notice to the decree-holder, or other person at whose instance or for whose benefit the Receiver was appointed : *O'Keefe* v. *Armstrong* (4). A person does not become a surety till he has been accepted as such by the Court and we cannot hold on principle that he can discharge himself without the consent of the Court. Disastrous consequences may, indeed, result to the estate in charge of the Receiver, if the surety be held competent to relieve himself from the moment he has given notice to the person interested. It is worthy of remark that this extreme position was not at first taken up by the surety in the case before us; as already stated, he realized at quite an early stage of the proceedings that he could secure his discharge only with the consent of the Court. We need not in this view examine the decision in *Subraya* v. *Ragammall* (2), which is in harmony with *Bai Somi* v. *Choksi* (5), and *Kandhya Lal* v. *Manki* (3) and is supported by the analogy of *Re Stark* (6) ; *Calvert* v. *Gordon* (7) and *Lloyds* v. *Harper* (8). The case last mentioned dees not assist the contention of the appellant that he was discharged from liability the moment he served notice upon the decree-holder. It may be conceded that a continuing guarantee, not under seal, for future advances or supplies, in consideration of the granting of such advances or supplies does not become binding until the person to whom it is given acts upon it, and may consequently be revoked before it is acted upon ; further, even if it has been acted upon, it may, if it contain no stipulation to the contrary, be revoked as to further transactions : *Offord* v. *Davies* (9) ; *Coulthart* v. *Clemenson* (10) and *Beckett* v. *Addyman* (11). The question, however, remains whether when a surety has been accepted as such by the Court, he can free himself from liability without the consent of the Court. We are of opinion that the answer must be in the negative.

The result is that the order made by Mr. Justice Greaves, which is obviously right on the merits, is confirmed and this appeal dismissed with costs.

Viscount Finlay.—In their Lordships' consideration of this case they see no reason for differing from the Courts below.

(1) [1909] 29 Cal. 68=6 C. W. N. 7.
(2) [1905] 28 Mad. 161=14 M. L. J. 482.
(3) [1909] 31 All. 56=6 A. L. J. 19=(1908) A. W. N. 288.
(4) [1852] 2 Ir. Ch. R. 115.
(5) [1895] 19 Bom. 245.
(6) 1 P. and D. 76.
(7) 7 B. and C. 809=3 M. and Ry. 124=7 L. J. (O. S.). K. B. 77.
(8) 16 Ch. D. 290=50 L. J Ch. 140=43 L. T. 481=29 W. R. 452
(9) 12 C. B. N. S. 748=31 L. J. C. P. 319=9 Jur. N. S. 22=6 L. T. 579=19 W. R. 758.
(10) 5 Q. B. D. 42=49 L. J. Q. B. 204=41 L. T. 798=28 W. R. 355.
(11) 9 Q. B. D. 783=51 L. J. Q. B. 597.

They will humbly advise His Majesty that this appeal should be dismisssed with costs.

Appeal dismissed.

Solicitors for Appellant—*Messrs. Pugh & Co.*

Solicitors for Respondents—*Messrs. Sanderson Lee & Co.*

✻✻ A. I. R. 1926 Privy Council 34

FROM MADRAS

4th February 1926

LORDS FINLAY & BLANESBURGH, SIR JOHN EDGE AND MR. AMEER ALI

Muhammad Khaleef Shirazi and *Sons* —Appellants.

v.

Les Tanneries Lyonnaises and *another* —Respondents.

Privy Council Appeal No. 30 of 1924.

✻ (a) *Evidence Act, S.* 101—*Debtor paying debt to a person other than creditor—Onus is on debtor to prove that the person was authorized by creditor to receive payment*

It is elementary law that when a creditor sues the debtor for the payment of a debt and the defence is that the debtor paid the debt to another person, it is for the debtor to prove that the other person had or had been held out to the debtor by the creditor as having had the authority of the creditor to receive payment of the debt on behalf of the creditor. [P 36, C 1]

✻✻ (b) *Civil P. C., S.* 107—*Discretion to admit additional evidence should be exercised only in the interests of justice.*

The power to admit additional evidence should be exercised by a Court of appeal with much caution and only in suits where it is satisfied that in the interests of justice it should be exercised, and such additional evidence when admitted will be evidence which, if produced at the trial would have been admissible. [P 36, C 2]

✻✻ (c) *Civil P. C., O.* 41, *R.* 33—*Sutt against A and B—Suit against B dismissed but decreed against A by trial Court—No appeal against dismissal filed—Appeal by A and B jointly decided against plaintiff—Plaintiff appealing to P. C. against A and B jointly against appellate decree—Appeal as regards B is not maintainable.*

A suit was filed against A, and B as agent of A. The trial Judge (the original Side of the High Court) passed a decree against A but by his decree dismissed the suit against B but decreed that B should pay to the plaintiffs taxed costs and interest thereon. The plaintiffs did not appeal to the High Court against the decree of the trial Judge dismissing the suit against B. A and B jointly appealed to the High Court against the decree which had been made against them. On that appeal the High Court found that A was not liable to pay anything in respect of one of the suit contracts and modified the decree in respect of their liability under the other suit contract with certain costs and dismissed the suit against A and B. Against that decree of the High Court the plaintiffs appealed to the Privy Council.

Held: the appeal to His Majesty in Council, in so far as B was concerned, was in effect, an appeal direct to His Majesty in Council from the decree of the trial Judge, which is not allowable under the Code of Civil Procedure, or under the Letters Patent of the High Court, and that O. 41, R. 33 is not intended to apply to such an appeal and accordingly the appeal so far as B was concerned should be dismissed. [P 35, C 1, 2]

G. R. Lowndes and *K. Brown*—for Appellants.

A. M. Dunne, Blanco White and *E. B. Raikes*—for Respondents.

Sir John Edge.—This is an appeal by the plaintiffs from a decree, dated the 14th March 1922, of the High Court at Madras, which was made in its appellate civil jurisdiction and varied a decree, dated the 20th October 1920, of a Judge of the same Court, which was made in the ordinary original civil jurisdiction of the High Court.

The appeal arises in a suit which was instituted with the leave of the High Court on the 3rd February 1919, in the ordinary original civil jurisdiction of the High Court by the plaintiffs, who live in the city of Madras, to obtain a decree against Les Tanneries Lyonnaises and their agent Monsieur J. Marret for money alleged to be due to the plaintiffs under a contract for the sale and delivery of goatskins under a contract of the 25th May 1917, and under a contract of the 26th January 1918, for the sale and delivery of sheepskins. There was another defendant to the suit named, C. Sowrimuthoorya Oodayar, against whom no relief was claimed. The suit was tried and the decree of the trial Judge was made in the ordinary original civil jurisdiction of the High Court. The French company carries on business at Oullins, near Lyons, in France. Marret and Oodayar live at Pondicherry. The contract of the 25th May 1917 was made by Marret as the agent of the French company with the plaintiffs in the city of Madras, and the money which might become due under it was payable at a Bank in the city of Madras. The contract of the 26th January 1918 was made by Marret at Pondicherry, and the money which might become due under it was payable to the plaintiffs at the Bank in the city of Madras. The trial Judge made on the 20th October 1920

a decree for Rs. 1,76,242-0-5, with interest thereon and for costs against the French company, and by his decree dismissed the suit against Marret and Oodayar, but decreed that Marret should pay to the plaintiffs taxed costs and interest thereon. The plaintiffs did not appeal to the High Court against the decree of the trial Judge dismissing the suit against Marret. They had obtained a decree against the French company for their entire claim, and with that they were then content. As appears by the record, the French company and Marret jointly appealed to the High Court against the decrees which had been made against them. On that appeal the High Court found that the French company was not liable to pay anything in respect of the claim under the contract of the 26th January 1918, and by its decree modified the decree against them made in respect of their liability under the contract of the 25th May 1917, with certain costs, and dismissed the suit against Marret and Oodayar. Against that decree of the High Court this appeal by the plaintiffs has been brought.

In the High Court Marret on behalf of the French company and himself had filed a joint written statement, In this appeal for the first time the French company and Marret are represented by different counsel instructed by separate firms of solicitors. Those learned counsel raised preliminary objections to the appeal the consideration of which their Lordships decided should stand over until the arguments on the appeal had been heard. Their Lordships will now state what those preliminary objections were and what is their decision on them. Each of the learned counsel contended that the suit was not within the cognizance of the High Court in its original civil jurisdiction. The learned counsel for Marret further contended that this appeal to His Majesty in Council is, in effect, an appeal against the decree of the trial Judge dismissing the suit as against Marret, from which decree the plaintiffs had not appealed, and that such an appeal was not allowed by the Code of Civil Procedure, 1908, or by the Letters Patent of the High Court. As to the objection that the suit was not within the cognizance of the High Court in its original civil jurisdiction, their Lordships find that the contract of the 25th May 1917 was made in the city of Madras, and it was agreed that the money payable under that contract should be paid in the city of Madras, and that it was agreed that the money payable under the contract of the 26th January 1918 should be paid in the city of Madras, and further find that the High Court, under its Letters Patent, gave leave to the plaintiffs to bring the suit in the ordinary original civil jurisdittion of the High Court, and consequently hold that the suit was within the cognizance of the High Court in its ordinary original civil jurisdiction, and disallow that objection. As to the objection especially raised by the learned counsel for Marret, that as the plaintiffs had not appealed against the decree of the trial Judge dismissing the suit, excepting as to costs against Marret, no appeal lay against him, their Lordships have been referred to the Code of Civil Procedure, O. 41, R. 33: *Gangadhar* v. *Banabashi* (1) and *Bhaidas Shivdas* v. *Bai Gulab* (2). Their Lordships think that this appeal to His Majesty in Council, in so far as Marret is concerned, is in effect, an appeal direct to His Majesty in Council from the decree of the trial Judge, which is not allowable under the Code of Civil Procedure 1908, or under the Letters Patent of the High Court, and they hold that the Code of Civil Procedure 1908, O. 41, R. 33 was not intended to apply to such an appeal, and they accordingly decide that the appeal, so far as Marret is concerned, should be dismissed, but without costs.

Their Lordships will now consider the appeal so far as it relates to the French company alone. The contract for goatskins of the 25th May 1917, was made with the plaintiffs by Marret as the agent of the French company, and it is now admitted in this appeal by the learned counsel for the French company that Marret, in making with the plaintiffs the contract of the 26th January 1918 for sheepskins, was the agent of the French company if he represented that he was making it as their agent. (Their Lordships then discussed the pleadings in the suit and the material evidence and proceeded.) Before considering separately the contracts of the 25th May 1917, and the 26th January 1918, their Lordships will

(1) [1915] 22 C. L. J. 390.
(2) [1921] 45 Bom. 718=48 I. A. 181 (P. C.).

state, so far as it is necessary to do so in this suit, what is the law in India as well as in England with regard to payments of debts to a person who, as in this suit, is alleged by a debtor to have had the creditor's authority to receive them on his behalf. It is elementary law that when a creditor sues the debtor for the payment of a debt and the defence is that the debtor paid the debt to another person, it is for the debtor to prove that the other person had, or had been held out to the debtor by the creditor as having had the authority of the creditor to receive payment of the debt on behalf of the creditor.

In the joint written statement which, according to the record, the French company and Marret filed, it was alleged that payments had been made to Oodayar as a partner of the plaintiffs. It was proved at the trial that Oodayar was not a partner of the plaintiffs in either of the contracts with which this suit is concerned. That defence was abandoned and it was alleged by Marret in his evidence, as their Lordships understood his evidence, that Oodayar had been authorized by the plaintiffs to receive the payments on their behalf, and later that Oodayar had been held out by plaintiffs to him as having their authority to receive them. That authority and the alleged holding out of it, is not admitted and is denied by the plaintiffs, and in their Lordships' opinion there is no reliable evidence that Oodayar ever had or had been held out as having any such authority. (Then their Lordships considered the contract of 25th May 1917, for goat skin and the contract of 26th January 1918 for sheep skins and proceeded). Their Lordships think that in fairness to the French company they should state what the French company allege was the position in which that company found itself after this appeal to His Majesty in Council had been presented. The French company say that they were first informed by the solicitors in London appearing for Marret that this appeal had been presented, and as their Lordships understand the French company's statement that company had previously no knowledge that a suit against them and Marret had been brought. The French company say that the proceedings in the suit in Madras were defended by Marret without the knowledge or consent of the French company, and that on receiving that information from Marret's London solicitors that this appeal had been presented, the French company was advised that they should be separately represented in this appeal, and instructed their London agents that their case in the appeal should be settled and lodged with all due expedition. If facts could have been proved which would have justified application to amend the decree no such application was made.

There is one other question raised by the appellants in this appeal. It relates to the admission in evidence by the Court of appeal of documents which were not in evidence before the trial Judge. The High Court as a Court of appeal in this suit had under S. 107 of the Code of Civil Procedure, 1908, power to take additional evidence. In their Lordships' opinion it is a power which should be exercised by a Court of appeal with much caution and only in suits where it is satisfied that in the interests of justice it should be exercised, and that such additional evidence when admitted will be evidence which, if produced at the trial, would have been admissible. The additional evidence admission of which is complained of on behalf of the appellants, however much it may have affected the judgments in the Court of appeal has not affected the judgment of their Lordships in the slightest degree.

Their Lordships will humbly advise His Majesty that the appeal, so far as it relates to Les Tanneries Lyonnaises, should be allowed, and the decree of the High Court in appeal should be set aside against both respondents, with costs payable by Les Tanneries Lyonnaises, and the decree of Mr. Justice Phillips should be restored and affirmed and that the appeal, so far as it relates to Monsieur J. Marret, should, save as aforesaid, be dismissed without costs. The respondents, Les Tanneries Lyonnaises should pay to the appellants their costs in the High Court and in this appeal.

Appeal allowed.

Solicitors for appellants — *Douglas Grant.*

Solicitors for respondents—*Thompson, Quarrell* and *Attneave, Joasselyn & Elwes.*

** A. I. R. 1926 Privy Council 37

FROM CALCUTTA

26th February 1926

VISCOUNT DUNEDIN, LORD BLANESBURGH, SIR JOHN EDGE AND MR. AMEER ALI

Rameswar Bazaz—Appellant.

v.

Rani Shyama Sundari Debi—Respondent.

Privy Council Appeal No. 148 of 1924.

** *Contract — Construction — Contract for sale of lands containing minerals and providing clause indemnifying the promisee in case a dispute as to title arises—Conveying minerals is not warranted.*

Where in the contract for the sale of lands containing valuable minerals, it was stipulated that if ever any dispute over title arises, with a Rajah, a third person, then the promisor shall remain liable for the sale; he shall give promisee all necessary papers, etc., for the establishment of his title.

Held: that in face of the clause it is impossible to construe the contract as one in which the promisor warranted the mineral as conveyed, and that all the vendee, if the contract was implemented, was to get was the chance of either fighting the Rajah or by having secured the surface rights, being in a position to hamper the Rajah in letting to anyone else, and consequently impelling him to grant fair terms to the plaintiff himself. [P 37 C 2; P 38 C 1]

G. R. Lowndes and *E. B. Raikes*—for Appellants.

L. DeGruyther and *K. Brown* — for Respondent.

Viscount Dunedin.—This is a case in which one Rameswar Bazaz sues Rani Shyama Sundari Debi for breach of contract. The Rani was in possession under a putni of certain brahmottar lands which were understood to contain valuable minerals. She had no decree of a Court affirming her right to these minerals. The minerals could belong to either the Rajah of Cossipore or Pachete, from whose estate the brahmottar lands had originally been taken, or to the Crown. But she might assert a title to the minerals. The plaintiff-appellant is in the coal business and was wishful to obtain the right to work this field. Accordingly, on 30th March 1918, he sent to the Rani a letter of offer. It is unnecessary to quote the letter at length. It is enough to say that it offered to pay an earnest of Rs. 1,201, for a prospecting lease, and the result of prospecting being satisfactory to take a lease on terms of a certain further earnest and a royalty on minerals mined at certain rates, with right to use the surface on certain further payments for the extraction of the mineral. Rs. 200 per biga was to be paid for damage to cultivated property. There was also the following clause:

"If ever any dispute over title arises with the Rajah of Cossipore, or anyone else, then you shall remain liable for the same; you shall give me all necessary papers, etc., for the establishment of your title as they may be required by me."

On the 11th April 1922, the Rani, acknowledging receipt of the earnest of Rs. 1,201, acceded to the request as to the property lease and mineral lease. Boring was done and mineral was proved to exist of a valuable quality. She, however, delayed to carry out the undertaking and eventually let the field to another person who was the Rajah's coal manager, and who, therefore, was in a position to settle with the Rajah.

The appellant instituted an action. At the trial he presented the agreements for a lease referred to. He put in a witness to show that the coal existed. He then put in an expert witness who, upon the hypothesis that the coal field belonged to the plaintiff, estimated that he would make a profit on the royalties fixed at the rate of Rs. 200 per biga. He led no other evidence. The defendant denied that there was a contract on various grounds.

The learned trial Judge found that there was a contract and breach thereof, and assessed the damages at Rs. 1,20,000, the calculation being on the said figure of Rs. 200 per biga on 600 bigas, which he considered to be the size of the field.

On appeal the learned Judges affirmed the judgment of the trial Judge as to the contract, and the breach thereof, but reduced the damages to Rs. 5,000, holding that there were no materials on which to assess the figure found by the trial Judge.

Appeal is taken against this by the plaintiff-appellant, but no cross-appeal was taken for the respondent as to the question of there being a contract.

Their Lordships are of opinion that the plaintiff took a completely wrong view of what the contract really was. In face of the clause quoted it is impossible to construe the contract as one in which the Rani warranted the mineral as conveyed. Accordingly all the plaintiff, if

the contract was implemented, was to get was the chance of either fighting the Rajah, which, in view of the decision of this Board in *Sashi Bhusan Misra* v. *Jyoti Prashad Singh Deo* (1), did not appear to offer a great prospect of success, or, by having secured the surface rights, being in a position to hamper the Rajah in letting to anyone else, and consequently impelling him to grant fair terms to the plaintiff himself. This the plaintiff was deprived of by the breach committed by the defendant. Exact valuation of such a lost chance was impossible, and the plaintiff had led no evidence to make approximate valuation easy. In the circumstances the appellate Court, acting as a jury would have done, allowed Rs. 5,000. Their Lordships do not think they ought to interfere with this determination, and they will humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

Solicitors for Appellant — *Watkins & Hunter.*

Solicitors for Respondent— *H. S. L. Polak.*

(1) [1917] 44 Cal. 585=44 I. A. 46 (P. C.).

⁂ A. I. R. 1926 Privy Council 38

FROM BOMBAY

1st March 1926

VISCOUNT DUNEDIN, LORDS SHAW AND SUMNER, SIR JOHN EDGE AND LORD SALVESEN

Maneckji Pestonji Bharucha and *another*—Appellants.

v.

Wadilal Sarabhai and Company—Respondents.

Privy Council Appeal No. 126 of 1924.

⁂ (*a*) *Contract Act, S.* 121—*Stipulation in S.* 121 *must be express.*

The stipulation referred to in the section must be an express stipulation and where in a contract of sale of shares nothi g is proved to the contrary it must be presumed that the contract is an ordinary contract for the sale of shares effected by bought and sold notes. [P 39 C 2]

⁂ (*b*) *Contract Act, S.* 95—*Unless there is possession there is no lien.*

The law as to lien is statutory and is contained in the 95th and following sections and unless there is possession there is no lien. [P 39 C 2 ; P 40 C 1]

⁂ (*c*) *Contract—Stock Exchange transactions.*

It would be an upset of all Stock Exchange transactions if it were suggested that a broker who sold shares by general description did not implement his bargain by supplying the buyer with certificates and transfers signed by the registered holders of the shares described. [P 40 C 1]

⁂ ⁂ (*d*) *Contract Act, S.* 78—*Choses in action are goods and equitable considerations are not applicable to them.*

In India by the terms of the Contract Act choses in action are goods, Hence equitable considerations not applicable to goods do not apply to shares in India. [P 40 C 1]

⁂ ⁂ (*e*) *Contract Act, S.* 83—*Share contracts—Delivery of certificates and blank shares to buyer—Buyer accepting—Sale is of ascertained goods and seller can sue only buyer but cannot sue any transferee from buyer.*

In cases of sale of shares contracts as soon as the seller hands over the certificates and blank transfers and the buyer accepts them and gives the seller the cheque, the goods become ascertained goods, the sale is complete and the property passes. From that time onward the seller can only sue buyer on the cheque or the price of the shares unpaid in respect that the cheque had not been honoured and he cannot sue any transferee from the buyer. [P 40 C 2]

⁂ (*f*) *Contract Act, S.* 121—*Bombay Stock Exchange rules—Rule* (*c*) *cannot be read as an express stipulation within S.* 121.

Rule (c) of the Bombay Stock Exchange cannot be read as an express stipulation in the sense of S. 121 because it does not say what S. 121 provides must be said and the rule has nothing to do with the perfection of contracts or the passing of property. It is for quite another pnrpose. [P 40 C 2]

A. C. Clauson, E. B. Raikes and *H. Johnston*—for Appellants.

J. Simon, G. R. Lowndes and *B. Dube*—for Respondents.

Viscount Dunedin.—In March 1920 the second plaintiff in this case, Arajania, who is not a certified share-broker, and who describes himself as the sub-broker of the first plaintiff Bharucha, who is a certified share-broker, sold on the Bombay Stock Exchange to first defendant, Gora, 129 shares of a company called Alcock, Ashdown & Co., Ltd., for delivery on the 14th April 1920. Neither of the two plaintiffs was the registered holder of any such shares. In order to make good the delivery the first plaintiff acquired the requisite number of shares in the market from various brokers, and took from these brokers blank transfers signed by the registered holders along with the corresponding certificates. These certificates and blank transfers were handed by the second plaintiff to the first defendant at 6 p.m., on the 14th April.

At 8 p.m., a cheque for the sum due under the contract in favour of the first plaintiff was handed to the second plaintiff. This cheque was dishonoured on the next day.

The first defendant, having had the blank transfers and certificates thus delivered to him, made certain propositions as to the raising of money to Manilal, a partner in the firm of Wadilal & Co., the second defendants, and handed the certificates and transfers to him. The second defendant in turn handed them to the third defendant, Ghia, again on certain propositions as to raising money

The cheque was never honoured, and the first defendant absconded. The present action is brought by the first and second plaintiffs against all the three defendants, asking for return of the certificates and blank transfers or otherwise for damages.

Proof was led before the trial Judge, who held in fact (1) that Plaintiff No. 2 acted as sub-broker to Plaintiff No. 1 and that, accordingly, Plaintiff No. 1 had a direct title to sue the other defendants; (2) that Manilal, the Defendant No. 2, knew when he took the certificates and shares that the cheque of Gora. Defendant No. 1, was not likely to be honoured. He gave a decree in favour of Plaintiff No. 1 against all defendants. The ratio of his judgment is to be found in the following passage:

> Gora was only an ostensible owner and the plaintiffs, who were the unpaid vendors, had equity in them, and they could have stopped Gora from getting these shares transferred in his name in the books of the Company, but if Gora had passed on these shares either by way of sale or by way of pledge to any third person who acted bona fide and without notice, then I certainly think that such a person would have a better title to these shares than the plaintiffs. But in this case it is abundantly clear that Gora himself felt that he was not the owner. . . . Manilal had notice that these shares were not paid for, and Ghia, being a mere nominee of Manilal, Ghia was in no better position than Manilal himself. They took these shares with the infirmity from Gora, and therefore they cannot claim these shares in priority to the plaintiffs.

He had previously pointed out that in a question with the Company the owners of the shares were the old owners who had signed the blank transfers.

On appeal by the second and third defendants the learned Judges of the Appellate Division of the High Court reversed the judgment of the Trial Judge and dismissed the action as against them. They held on the facts that Plaintiff No. 2 had acted as agent for Plaintiff No. 1, and that consequently, as Plaintiff No. 2 was not a certified broker, the buyer was not affected by the rules of the Stock Exchange. This is only of importance as regards a certain Rule C, with which their Lordships will afterwards deal. On the merits of the case they held that, under the Indian Contract Act the property of the shares as sold passed on the delivery of the certificates and blank transfers to Gora; that, after that, Plaintiff No. 1 had no claim against Gora except upon the cheque; that consequently he had no claim against Defendants Nos. 2 and 3, and could not have a judgment against Defendant No. 3 for delivery of the certificates and transfers. They held further that S. 121 of the Contract Act, which is in these terms—

> When goods sold have been delivered to the buyer, the seller is not entitled to rescind the contract on the buyer's failing to pay the price at the time fixed unless it was stipulated by the contract that he should be so entitled.

prevented the plaintiff from rescinding the sale, there having been no stipulation provided in the contract for sale that he should be so entitled. Appeal was then taken by the plaintiffs to the King in Council.

Their Lordships agree that the stipulation referred to in the section must be an express stipulation and that, as nothing was proved to the contrary, it must be presumed that the contract here was an ordinary contract for the sale of shares effected by bought and sold notes.

On the hearing of the appeal to their Lordships, the view expressed by the trial Judge that Gora was only an ostensible owner of the shares and the plaintiff, who was the unpaid vendor, had the equity in them, was elaborated into an argument that, according to the law of England, there would be an equitable lien in favour of the unpaid purchaser and that that law applied. Such a view would be so far-reaching in ordinary Stock Exchange transactions that their Lordships think it necessary to emphasize their view of its unsoundness. In the first place, so far as lien is concerned, the law as to lien is statutory and is contained in the 95th and following sections of the Indian Contract Act.

Section 95 applies to this case; unless there is possession there is no lien. But, further, there seems to their Lordships a good deal of confusion arising from the prominence given to the fact that the full property in shares in a Company is only in the registered holder. That is quite true. It is true that what Bharucha had was not the perfected right of property, which he would have had if he had been the registered holder of the shares which he was selling. The Company is entitled to deal with the share-holder who is on the register, and only a person who is on the register is in the full sense of the word owner of the share. But the title to get on the register consists in the possession of a certificate together with a transfer signed by the registered holder. This is what Bharucha had. He had the certificates and blank transfers, signed by the registered holders. It would be an upset of all Stock Exchange transactions if it were suggested that a broker who sold shares by general description did not implement his bargain by supplying the buyer with certificate and blank transfers, signed by the registered holders of the shares described. Bharucha sold what he had got. He could sell no more. He sold what in England would have been choses in action, and he delivered choses in action. But in India, by the terms of the Contract Act, these choses in action are goods. By the definition of goods as every kind of moveable property it is clear that, not only registered shares, but also this class of choses in action, are goods. Hence equitable considerations not applicable to goods do not apply to shares in India.

Now S. 78 is as follows :

> 78. Sale is effected by offer and acceptance of ascertained goods for a price * * *
> or of a price for ascertained goods, * * *
> together with payment of the price or delivery of the goods.

Here the goods were not ascertained goods at the time of the contract, for the contract was only for so many shares of Alcocks,' not of any particular shares, but then S. 83 provides :—

> 83. Where the goods are not ascertained at the time of making the agreement for sale, but goods answering the description in the agreement are subsequently appropriated by one party for the purpose of the agreement, and that appropriation is assented to by the other, the goods have been ascertained, and the sale is complete."

So soon, therefore, as Arajania, acting for Bharucha, handed Gora the certificates and transfers, and Gora accepted them and gave the cheque, the goods became ascertained goods, the sale was complete and the property passed. From that time onward Bharucha and Arajania could only sue Gora on the cheque, or for the price of the shares unpaid in respect that the cheque had not been honoured. They had no longer any jus in re of the certificates and transfers. They had no statutory lien, for they had parted with possession, and, consequently as they had no contract with Defendants Nos. 2 and 3, they could not sue them for delivery of the shares, whether the defendants had got good title as against Gora or had not.

Their Lordships have already mentioned that the trial Judge held that the sale was between brokers, and was, therefore, under the rules of the Stock Exchange, from which finding the Court of appeal dissented. In their Lordships' view it is not necessary to decide this question of fact. They will assume, for the purpose of the argument, that the sale was as between brokers. That brings in Rule C of the Bombay Stock Exchange which is as follows :

> C. If the cheque given for the money of the shares will not be honoured at the bank on the day following the day when the cheque is given, the shares shall have to be returned immediately to the person selling (them), and the person purchasing them shall have to take away those shares having paid the rupees in cash before two o'clock on that very day. And if the person purchasing shall fail to do so, those shares will be sold off by auction before three o'clock.

* * * * * *

It was argued that the effect of this rule was to make the delivery not actual but conditional, with the result that the property did not really pass till the cheque was honoured. Their Lordships consider this argument quite unsound. The Contract Act settles that property is to pass on delivery. Delivery is a fact and the statutory result must follow. Further, the rule cannot be read as an express stipulation in the sense of S. 121 because it does not say what section 121 provides must be said. But in truth, in their Lordships' view, the rule in question had nothing to do with the perfection of contracts or the passing of property, It is for quite another purpose. The buyer may be unable, from temporary embarrassment, to meet his cheque on an exact day. Time is of the essence of this

ordinary contract of sale of shares ; therefore, he is enjoined by the rule to hand back the shares ; he is given the latitude of paying up till 2 o' clock, but if he does not do so then they are sold by the authorities, so as to fix, without further ado, the damages which are become due for breach of contract.

Their Lordships will accordingly humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

Solicitors for Appellants—*T. L. Wilson and Co.*

Solicitors for Respondents — *Hore, Pattisson & Bathurst.*

✻ A. I. R. 1926 Privy Council 41

FROM CALCUTTA

8th March 1926

VISCOUNT FINLAY, LORDS PHILLIMORE AND BLANESBURGH, SIR JOHN EDGE AND LORD SALVESEN

Secretary of State—Appellant.

v.

Raja Jyoti Prashad Singh Deo Bahadur and *others*—Respondents.

Privy Council Appeal No. 15 of 1923 from Bengal Appeals Nos. 24 and 25 of 1921.

✻ (*a*) *Practice—Privy Council—Argument not sifted in Courts below will be entertained very cautiously—Specially so when the point is complicated Indian Law point.*

The Board of their Lordships of the Privy Council have long established it for themselves as a principle of wisdom and prudence that they should be very chary of entertaining an argument which has not been sifted in the Courts below ; and if this be true as a general rule, it is especially true when the question to be decided concerns the diversified and complicated Indian Law as to tenure of land. [P. 42, C. 2, P. 43, C. 1]

(*b*) *Land tenure—Ghatwali or digwar tenures—Ghatwals or digwaras may be co-ordinate or subordinate to the Raja in the geographical limits of whose zamindari they are situate—Onus is on zamindar to prove that they are subordinate to him.*

The mouzahs held by ghatwals or digwars may be within the zamindari of the Raja in the geographical limits of whose zamindari they are situate or the ghatwals or digwars may hold directly of the sovereign power as co-ordinate with rather than subordinate to the Raja. But it is always a question of fact whether they are or are not subordinate ; and the burden is upon the zamindar to prove that they are part of his zamindari : 13 *M. I. A.* 438 (*P. C.*), *Rel. on.*

[P. 43, C. 2,; P. 44, C. 1,; P. 45, C. 1]

(*c*) *Land tenure—Ghatwali tenure is hereditary.*

The ghatwali tenure, though peculiar because of a certain reserved power of selection, nevertheless ranks as hereditary. [P. 44, C. 2]

✻ (*d*) *Evidence Act, S. 114—Presumption.*

Presumption should not be made against but in favour of the existing state of things.

[P. 49, C. 1]

(*e*) *Land tenure—Thanadari landholder—Contiguous zamindar holds somewhat superior position over thanadari lands.*

The holders of thanadari land stand in a certain position to the contiguous zamindar. If the lands are resumed, they are to be settled with the zamindar ; and it may be that they may even be described as settled with the zamindar in a certain sense, and that there is a sort of superiority in the zamindar which might entitle him to the surface of the land in case of escheat, but whether this would give him a claim to the minerals is a question. The view that thanadari lands, though made resumable, were not always resumed is a difficult one to support : 6 *M. I. A.* 101 (*P. C*) ; 10 *M. I. A.* 16 and 44 *Cal.* 841 (*P. C.*), *Ref.*

[P. 45, C. 2]

✻ (*f*) *Deed—Construction — Grant — Ancient grant.*

Should the general words of an ancient grant be uncertain, they may be fairly explained by subsequent usage. [P. 46, C. 1]

(*g*) *Practice—Lower Court's decision reversed on some of the grounds only—Lower Court's decision as regards other grounds should not be deemed to be confirmed.*

Where several points are raised by the decision of the Court under appeal and their Lordships, having come to the conclusion that they must advise His Majesty to reverse the decision of the Court below on some of the grounds only, abstain from expressing any opinion on the other grounds, in so doing they are not to be held to have given any authority thereby to that part of the decision which they have not touched ; *Imperial Japanese Government* v. *The P. and O. Steam Navigation Company*, (1895 *A. C.* 644), *Foll.* [P. 49, C. 1]

A. M. Dunne and *K. Brown*—for Appellant.

W. H. Upjohn, L. DeGruyther, J. M. Parikh and *G. R. Lowndes, E. B. Raikes* and *G. B. McNair*—for Respondents.

Lord Phillimore.—This suit was brought on the 3rd September 1914, by the respondent, the Raja of Pachete, against the Secretary of State for India and certain coal and iron companies who are, with the Secretary of State, appellants before their Lordships' Board, and other parties described as digwar ghatwals, alleging that three mouzahs known as Kendua, Parira and three-quarters of Garh Parira in the Burdwan district of Bengal were included in his zamindari, and that this being so he was the proprietor of the mineral rights under the said mouzahs, and that the Secretary of State and the digwars had purported to

grant leases of the mineral rights to the defendant companies, and praying that it might be declared that he was the rightful owner of the minerals and that the lessees and sub-lessees had no right to them and should be restrained by injunction from trespassing and working the minerals, and asking for damages with interest and costs.

The Secretary of State in his defence said that the plaintiff was never within 12 years in possession of the mineral rights claimed by him, and that he and the Defendants 2, 3 and 5, had been for more than the said period openly and as of right in enjoyment of the minerals, and that the three mouzahs did not form part of the permanently settled estate of the plaintiff, but had been digwari chakran from before the Permanent Settlement of 1793. He further denied the plaintiff's title to the minerals. The other defendants set up similar defences.

Issues having been settled by the Subordinate Judge, the case was transferred by the District Judge to his Court in July 1917, and heard by him on oral and documentary evidence in the months of April and May 1918.

On the 28th May 1918, he delivered judgment, supporting all three of the defences raised, i.e., holding that the plaintiff had no title to the villages in suit that if he had been the landowner he would not have the right to the minerals which would still be in the Crown, and that the defence of adverse possession and consequent limitation was also good.

The appeal being taken to the High Court of Judicature at Calcutta, that Court, on the 24th July 1921, reversed the judgment, and while refusing the plaintiff some of the relief which he claimed made a decree in his favour in terms following :

> It is ordered and decreed that the plaintiff be and he is hereby entitled to a declaration that the mouzahs in dispute described in the plaint out of which this appeal arises together with the minerals underlying them are included within his permanently settled estate, that he is the rightful owner of the minerals in the mouzahs and that none of the defendants has any right to the minerals in the mouzahs. And it is further ordered and decreed that a perpetual injnnction do issue restraining the defendants from working coal or other minerals in the mouzahs.

The Secretary of State and the companies have applied to His Majesty in Council from this decrce.

The ground upon which the High Court held that the mouzahs in dispute with the minerals underlying them were within the permanently settled estate was that they were what is called thanadari lands. Having so decided, the Judges thought that the further defence of limitation was not good, nor was the defence good that the minerals under these villages belonged to the Crown. Their Lordships will take the question of ownership first.

The learned counsel for the respondent Raja, when it came to their turn, while accepting and supporting the reasoning of the High Court rested the main strength of their argument upon two other grounds, the first of which comes to be discussed in logical order before the submissions made by the appellants.

This first argument was founded upon the language of the regulations of 1790 and 1793, which established the decennial and permanent settlements of Bengal, Orissa and Behar.

Regulation 8 of 1793, sub-S. 4, speaks of the settlement being " concluded with the actual proprietors of the soil whether zamindars, talukdars or chaudhris."

Upon the strength of this and other passages in the regulations, it was urged that the government of the day recognized a pre-existing right in the zamindars and others and did not confer rights by the settlement, and consequently that it was possible that lands owned by a zamindar—though not la-khiraj or thanadari —might never have been settled and yet be his property and so might descend to the successor in title of the original zamindar, having remained unsettled through all these years.

Whether such lands according to the argument were to be reckoned as part of a zamindari or to be treated as de hors the zamindari was not made clear.

The argument receives no support from decided cases and appears at first sight to be contrary to the teaching of the text-books ; but their Lordships are relieved from considering its force because it was never submitted to either of the Courts in India.

Courts of Final Appeal—whether it be the House of Lords or this Board—have long established it for themselves as a principle of wisdom and prudence that they should be very chary of entertaining an argument which has not been sifted in the Courts below;

and if this be true as a general rule, it is especially true when the question to be decided concerns the diversified and complicated Indian Law as to tenure of land.

Not only is there no trace of this point having been brought before the Indian Courts; but it is apparent that the case of the respondent was rested from the beginning on other grounds. Paragraph 2 of his plaint states that the three mouzahs in question are "included in the revenue-paying ancestral zamindari of the plaintiff known as Chakla Pachete"

The 2nd issue as suggested by the plaintiff was:

"Are the mouzhas Kendua, Parira and three-fourths of Garh Parira situate within Chakla Panchkote the permanently-settled zamindari of the plaintiff, and are they included within the said permenent settlement?"

and as actually fixed, was in the following words:

"Were the mouzahs in suit permanently settled by Government with the plaintiff's ancestors, and is the plaintiff by right of such settlement entitled to the mineral rights under the mouzahs?"

These things being so, their Lordships do not feel that they ought to give further consideration to this argument.

The argument, however, as to the kind of recognition which was given to those who were in the position of zamindars at the time of the decennial and permanent settlements, and the deductions to be drawn not only from the regulations but from the despatches and minutes of those in authority is not, as will be noticed hereafter, without valuable bearing upon the question, which in their Lordships' opinion is the real question which was intended to be raised, that is, whether the three mouzahs were permanently settled with the plaintiff's ancestors and form part of the plaintiff's zamindari.

The zamindari of the Raja of Pachete is of great size and is said to extend over more than 2,000 square miles, with more than a thousand villages or mouzahs upon it. The three mouzahs in question are interlocked with the unquestioned portion of the zamindari but it is doubtful whether all three are absolutely enclosed in it. The topographical situation is such as to afford some slight presumption that the three mouzahs are part of the zamindari.

The contents of the plaintiff's estate are to be deduced from the kabuliat given by the then Raja upon the occasion of the permanent settlement of his zamindari in the year 1793.

The divergence of the two Courts in India begins with the construction of this kabuliat.

The material parts of it are as follows:—

This kabuliyat is executed by me Maharaja Sri Sri Raghunath Narayan Deb to the effect following;—That my zamindari Pargana Punchkoti etc., appertaining to the Province of Bengal, the paradise of the world, exclusive of Gunjes, Bazars and Hats and of the entire sayerats and mutfara (ground rents) and exclusive of all lakheraj lands whether Sanadi or Besanadi of that pargana, is settled with me in mokurari as my Tahut for the term of ten years from 1197 B. S. to 1206 B. S. as per schedule below, at a jumma of sicca Rs. 52,853 (fifty-two thou and eight hundred and fifty-three) annually, i. e., at sicca Rs. 5,28,530 (five lakhs twenty-eight thousand five hundred and thirty) in the total, inclusive of all abwabs in force in the said zillah. So I agree, and give in writing that I shall pay the said amount of revenue as per separate kistibandi without excuse or variation. . . . And I shall file within the current year in the Zilla Record Room a list under my signature, showing village by village the mofussi distribution of the jumma fixed in the Sadar for my Tahut in proportion to the rentals therefrom together with the areas of Talabi and Betalabi lands within the four boundaries of the settled Hudda. And in future in the beginning of each year, within the first three months, I shall deliver a list of such distribution of revenue. In case of neglect or delay in this matter, I shall be answerable to the Government. I shall not without the Huzur's permission and advice make any Brahmottar, Debottar, Mahatran, Aima, Madadmas, Piran and Fakiran grants, etc.—any sort of lakheraj (tenures)—to anybody in the said pargana.

The schedule, if ever there were one, is missing. There are certain sarasikan papers of 1790 bearing the signature of the Raja, which in the opinion of the District Judge represent the list which the Raja undertook to file within the current year showing not only the mofussil distribution of the jumma but also the area of the lands whether talabi or betalabi. These sarsikan papers mention 1,197 villages. They do not contain the three mouzahs in question. They contain, however—and this is of some importance—the name of one mouzah stated to be occupied by digwars and to be paying a rent.

The three mouzahs in question in this suit have been in the occupation of the digwar ghatwals for as far back as can be traced, certainly for a period anterior to the settlement with the Raja. They may, notwithstanding, be within his

zamindari ; or the digwars may hold directly of the sovereign power as co-ordinate with rather than subordinate to the Raja.

In the weighty judgment prepared and delivered in 1855 on behalf of the Board by Mr. Pemberton Leigh (afterwards Lord Kingsdown) in the case of *Raja Lelanund Singh Bahadoor* v. *Bengal Government* (1) an account was given of the three classes of service tenures which are or were not uncommon in India.

The lowest class of chakeran lands are those held by minor officers of the zamindar whom he appoints and with whose services he could dispense, thereupon resuming their lands for the purpose of imposing upon them suitable rent. Next in order come the tannahdars, police officials, whom in old times it was the duty of the zamindar to provide, whom he allowed to occupy their lands, either rent free or subject only to a quit rent, and in respect of whom the Government made an allowance to the zamindar to recompense him for the rent which he had lost.

By Regulation 1, S. 8, Cl. 4 of 1793, it was provided that the zamindars might be relieved of their police duties ; and in that case the Government might resume the allowances or the produce of the lands, as it thought proper. In such cases the zamindars would in turn resume the lands of their subordinate tannahdars.

A higher class is that of ghatwals, some of whom, as mentioned in Lord Kingsdown's judgment, might be persons of high rank, though in other cases the position of a ghatwal might be treated as "something between that of a chowkadar and an office peon," to adopt the language of the District Judge in this case.

But whatever their dignity, these ghatwals were always of ancient date. It is said by the High Court in this case that the East India Company never created a ghatwali tenure ; and though there is some indication in the narrative in Lord Kingsdown's judgment that there actually were creations of some ghatwali tenures in that case, no doubt the action of the East India Company was generally confined to recognition and confirmation. Digwars in this district appear to take the same position as ghatwals in other districts.

(1) [1854-57] 6 M. I. A. 101=4 W. R. 77=1 Suther 248=1 Sar. 505 (P. C.).

Still the question remains—were the officers of the highest class always subordinate to the zamindar, or were they sometimes co-ordinate? In the case in *Raja Lelanund Singh Bahadur* v. *Bengal Government* (1), it was held that the Raja had made his settlement for his zamindari as a whole or block, that the ghatwali lands were included in this settlement, and that the ghatwals held of him. Indeed, it was agreed and admitted in that case that the ghatwali lands formed part of the zamindari, the holders paying a quit rent to the zamindar.

But as stated in the judgment already quoted, the nature and extent of their rights probably differed in different districts and in different families. That judgment refers to the tenures in Beerbhoom, the holders of which—though no doubt they paid a fixed rent to the zamindar—are entitled to hold their lands in perpetuity, subject to the performance of certain duties. (See Regulation 29 of 1814.)

The classes of possible ghatwali tenures and their nature are described in much detail in the case of *Narayan Singh* v. *Niranjan Chakravarti* (2) in which the judgment of the Board was delivered by Lord Sumner in 1923, dealing with the Sonthal parganas. He says :

"In the Sonthal parganas there are for practical purposes three classes of ghatwali tenures ; (a) Government ghatwalis created by the ruling power ; (b) Government ghatwalis, which since their creation and generally at the time of the Permanent Settlement have been included in a zamindari estate and formed into a unit in its assessment ; and (c) zamindari ghatwalis, created by the zamindar or his predecessors and alienable with his consent. The second of these classes is really a branch of the first. The matter may, however, be looked at broadly. In itself, 'ghatwal' is a term meaning an office held by a particular person from time to time, who is bound to the performance of its duties, with a consideration to be enjoyed in return by the incumbent of the office. Within this meaning the utmost variety of conditions may exist. . . . The superior who appoints him may also, in the varying circumstances of the organization of Hindustan, be the ruling power over the country at large, the landholder responsible by custom for the maintenance of security and order within his estates, or simply, the private person, to whom the maintenance of watchmen is, in the case of an extensive property, important enough to require the creation of a regular office."

The tennre though peculiar, because of a certain reserved power of selection, nevertheless ranks as hereditary, *Raja*

(2) A. I. R. 1924 P. C. 5.

Durga Prashad Singh v. *Tribeni Singh* (3). Colonel Dalton, Commissioner of Chota Nagpur in a letter of 14th June 1869, (Record, Pt. II, p. 389) gives a useful account of their origin.

While, therefore, it may well be—and in fact it is ascertained in respect of some tenures in this very case—that the digwars or ghatwals are subordinate to the zamindar it is always a question of fact whether they are or are not subordinate ; and it is upon this footing that the Courts in India and their Lordships have approached the present case.

That the burden was upon the respondent to prove that they are part of his zamindari is well settled. The case of *Forbes* v. *Meer Mahomed Tuquee* (4) where this Board held that the disputed lands were within the geographical limit of the zamindari and yet not proved to be of it, is strong on this point (see pages 457 and 458.)

Now the point made by the District Judge is that the kabuliat covers the whole estate of the Raja, that it refers to a list of villages and undertakes to show village by village the mofussil distribution of the jumma, that in fact the list (i.e., the sarsikan papers) does show the revenue set aside for each, and therefore, in his view, it is not an engagement for a block, but a series of engagements for the several villages which are parcel of the zamindari.

The learned Judges in the High Court are of opinion that the engagement was for the block, and that it was only intended to enumerate the villages which paid revenue. (The judgment then discussed the kabuliyat in this case and several reports relevant to the question and proceeded) Presumption should not be made against but in favour of the existing state of things.

Their Lordships are, therefore, of opinion, as indeed were both the Courts in India, that in the ordinary sense of the word these villages were not within the zamindari of the respondent, or, to put it in another way, both Courts held that they were neither malguzari nor chowkidar chakran.

The High Court, however—and this is the third point to be discussed—decided in his favour upon the theory that they were thanadari lands. Whether it is right as a matter of terminology to describe thanadari lands as being within the zamindari or outside need not be here discussed.

No doubt the holders of thanadari land stand in a certain position to the contiguous zamindar. If the lands are resumed, they are to be settled with the zamindar, and it may be that they may even be described as settled with the zamindar in a certain sense and that there is a sort of superiority in the zamindar which might entitle him to the surface of the land in case of escheat. Whether this would give him a claim to the minerals is a further question. (His Lordship then, while discussing the view taken by the High Court on the point proceeded.) But the learned Judges of the High Court took the view that thanadari lands, though made resumable, were not always resumed. This view is a difficult one to support in the face of the observations of this Board in the cases of *Raja Lelanund Singh Bahadoor* v. *Bengal Government* (1), *Joykishen Mookerjee* v. *Collector of East Burdwan* (5) and *Ranjit Singh* v. *Kalidasi Debi* (6).

But a further difficulty is created by the documents in this particular case.

Mr. Leslie, the Collector, reporting in August 1793, says that at the making of the decennial settlement in his district, no allowance was made for police officers to any of the zamindars except the Pachete Raja who got a deduction from his revenue of Rs. 1,662 for the maintenance of thanadars. Mr. Leslie proceeds to say that he has directed the Raja to discharge the thanadars employed by him at the end of the present month and to pay to the revenue Rs. 1,662, which it is known he did pay. The sum is slightly differently stated by Lala-Kanji as Rs. 1,600.

If these lands were thanadari, why have they not been long ago resumed ? If they had been resumed, Government would have acquired an increase of revenue from the Raja, and the Raja would have been able to draw rent from the land.

As their Lordships have already observed in dealing with the earlier part of

(3) [1918] 46 Cal. 362=45 I. A. 251 (P. C.).
(4) [1869-70] 13 M. I. A. 438=5 B. L. R. 529=14 W. R. 28=2 Suther. 358=2 Sar. 588 (P. C.).
(5) [1863-66] 10 M. I. A. 16=1. W. R. 26=1 Suther. 542=2 Sar. 54 (P.C.).
(6) [1917] 44 Cal. 841=44 I. A. 117 (P.C.).

the case the long established usage and possession is not reconcilable with the theory that these are thanadari lands.

In considering the effect of the kabuliyat the principles of the decision in the *Duke of Beaufort* v. *Mayor, Aldermen and Burgesses of Swansea* (7) fortified by the observations in the judgments of this Board delivered by the Earl of Halsbury in *Van Diemen's Land Co.* v. *Table Cape Marene Board* (8), and by Lord Atkinson in *Watcham* v. *Attorney-General of East Africa Protectorate* (9) may be applied, viz., that should the general words of an ancient grant be uncertain, they may be fairly explained by subsequent usage.

The result is that, in the opinion of their Lordships, these lands are not thanadari lands, and the District Judge was right on the first point to be decided, viz.. whether these mouzahs were or were not within the Raja's zamindari. Having arrived at this conclusion their Lordships deem it unnecessary and inadvisable to pronounce upon the other two defences raised by the several appellants. The question whether mines and minerals belonged to landowners or to the Government is a far reaching one, on which they would be unwilling to embark without having the fullest assistance of counsel.

In a case which came before this Board several years ago, the *Imperial Japanese Government* v. *The P. & O. Steam Navigation Company* (10) two points of great public importance were raised by the decision of the Court under appeal, and their Lordships having come to the conclusion that they must advise His Majesty to reverse the decision of the Court below on the first ground abstained from expressing any opinion on the second ground, while they carefully explained that in so doing they were not to be held to have given any authority thereby to that part of the decision which they did not touch. Their Lordships would desire to be understood to be acting in the same way in the present case.

The respondent has failed to prove that he has any right to the minerals under these three villages and the decision of the High Court must be reversed and that of the District Judge restored. This is all that their Lordships have to do. They have not to determine, as between the two sets of appellants, which is entitled to the mines, nor who is entitled to them.

The appeals will be allowed with costs here and below for both sets of appellants ; and unfortunately provision must be made for the costs of of the abortive hearing in December 1924. On that occasion, owing to the misconduct of the solicitor then acting for the respondent, he was not represented : and it was not till after their Lordships had heard the appellants' counsel for several days and the arguments had been concluded, that it was discovered that the absence of counsel for the respondent at their Lordships' Bar was due to the misconduct of his solicitor.

The case has accordingly been set down again and heard anew. As it was due to no fault of the appellants that the respondent was not represented at the first hearing, they must have the costs of their attendance at that hearing. But their Lordships think that the respondent need not be charged with the costs occasioned by his motion to restore his case to the paper, and that in respect of this motion which was heard on two occasions, each party should bear his own costs. Their Lordships would humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors for Appellant—*The Solicitor, India Office.*

Solicitors for Respondents—*Downer & Johnson* and *Sanderson Lee & Co.*

(7) [1894] 3 Ex. 413.
(8) [1906] A. C. 92=75 L. J. P. C. 28=93 L. T. 709=54 W. R. 498=28 T. L. R. 114.
(9) [1919] A. C. 533=87 L. J. P. C. 150=34 T. L. R. 481=120 L. T. 258.
(10) [1895] A. C. 644.

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(FROM OUDH)

16th March 1926

VISCOUNT DUNEDIN, LORD BLANESBURGH, SIR JOHN EDGE AND MR. AMEER ALI

Balbhaddar Singh and *another*—Appellants.

v.

Badri Sah and *another*—Respondents.

Privy Council Appeal No. 66 of 1924 : from Oudh Appeal No. 17 of 1923.

** (a) *Malicious prosecution—Essentials are*: (1) *termination of proceedings in favour of plaintiff*; (2) *prosecution by defendant without reasonable and probable cause, and* (3) *malicious intent of defendant.*

In an action for malicious prosecution the plaintiff has to prove that he was prosecuted by the defendant; that the proceedings complained of terminated in favour of the plaintiff if from their nature they were capable of so terminating, that the prosecution was instituted against him without any reasonable and probable cause and that it was due to a malicious intention of the defendant, and not with a mere intention of carrying the law into effect.

A prosecution comes to an end even when a Magistrate declines to commit. [P 49, C 1]

* (b) *Malicious prosecution — Burden of proof—Plaintiff must prove that defendant invented the story and instigated proceedings.*

The question is not; "Did the plaintiff commit the offence" or did defendant invent the offence against plaintiff; the two queries exhausting the possibilities of the situation. The question is: Has plaintiff proved that defendant invented and instigated the whole proceedings for prosecution. [P 51, C 1]

(c) *Malicious prosecution—Prosecution giving information naturally leading to prosecution is prosecution.*

In any country, where, as in India, prosecution is not private, an action for malicious prosecution in the most literal sense of the word could not be raised against any private individual. But giving information to the authorities which naturally leads to prosecution is just the same thing. And if that is done and trouble is caused, an action will lie. [P 51, C 1]

De Gruyther and *B. Dube*—for Appellants.

A. M. Dunne and *T. B. D. Ramsay*—for Respondents.

Viscount Dunedin.—The appellants and respondents are lambardars and the principal inhabitants in the village of Mohiuddinpur. The suit arises out of circumstances of a remarkable character, which took place in connexion with a crime as to which the complete truth will in all likelihood never be discovered.

One Sheo Bux, a humble inhabitant of the village, was last seen alive on the evening of the 17th September 1919. As he was under police supervision his absence after that date was noticed by the village policeman, but it was supposed that he had gone to some other village.

On the 20th September, a little after noon, a party of four persons arrived at the police office, which is situated at a place called Pasgawan, about two miles from the village. These were Badri Sah, a lambardar in the village, and one of the respondents, Hazari, a cultivator, his son, Raghunath, aged 18, and Bharat, a cultivator. The sub-inspector of Police was, at the moment, absent, and a policeman was in charge. Raghunath then proceeded to make a confession, which was recorded in the police diary of the day. The confession was to this effect:

The appellants had, some time ago, offered him Rs. 500 if he would do away with Sheo Bux. He had returned an ambiguous answer to the proposal. On the 17th September his father had gone away from the village. The appellant Bachchu had then said that this was the opportunity desired. Accordingly, when nightfall came the two appellants came to his house and despatched Teja, a barber, 16 years old, to fetch Sheo Bux. They all sat down; then Balbhaddar fell upon Sheo Bux, put his hand on his mouth, while Bachchu grappled with him. With the assistance of Teja and himself, Raghunath, they carried him into the house. He and Teja held his feet. Balbhaddar sat on his chest and held his mouth and Bachchu, with a knife, cut his throat, and he died. A hole was then dug in the floor of the house and the body buried. He applied for his Rs. 500, but was told by the appellants he would get that when they took the body away. On the 19th September he asked them to take away the body, but they said that they had had no opportunity of doing so. This day, that is, the 20th, his father had returned and he told him the whole story. His father went to Badri Sah, who told him to bring Raghunath to him where he was sitting along with Bharat Singh. To them he repeated the story, whereupon they all took him to the police office. After this he was consigned to the lock-up, and the policeman in charge sent a message to the Sub-Inspector. The Sub-inspector hurried back to the village and sent for Raghunath from the lock-up. He repeated to him the same confession, and on being taken to his house pointed out where the body was buried and where the shoes and garments of the deceased were also buried.

The body was exhumed; the shoes and garments found. It was the body of Sheo Bux and his throat was cut. The Sub-Inspector thereupon arrested Teja and locked him and Raghunath up. The next morning he sent both Raghunath and Teja to Lakinpur, and there, on the

24th September, they were brought before the Magistrate. The Magistrate, as in duty bound, took a statement from each of them, no policemen being present, and he having duly informed them that he was a Magistrate. Raghunath repeated his confession with a little more dramatic detail, but in all essential respects as before. Teja gave a shorter account. He described the murder in identical terms. To each of these confessions the Magistrate appended this note :

I believe that this confession was voluntarily made. It was made in my presence and hearing. It was read over to the person making it, and was admitted by him to be correct. It contains a full and true account of the statement made by him.

On the 27th October the Magistrate, having examined some other witnesses, among whom was Mt. Parbati, the mother of the murdered man, who swore that, on the 17th, she saw the two appellants along with Raghunath and Teja at Raghunath's house, issued warrants for the arrest of the two appellants. The appellants were absent and the warrant was not executed.

On the 30th December the Magistrate took up the case, and on the evidence committed Raghunath and Teja for trial, but discharged the appellants who, without the execution of the warrant had voluntarily appeared, as he considered there was no real evidence against them except the confessions of Raghunath and Teja. Subsequently, some doubt having arisen in the mind of the District Judge as to whether this dismissal was right, summonses were issued to the appellants to appear before the District Judge. These were taken up by the District Judge, Mr. H. G. Smith, who was not the Judge who had raised the doubts. He again discharged the appellants, considering that there was not sufficient evidence to warrant their being put on their trial.

The trial took place ; but when Raghunath and Teja were asked as to their confessions, they both admitted that they had made them, but stated that they were untrue. Raghunath said :

I said to Badri that the corpse seemed to be in the house. Badri Sah then took me to his chaupal and there he gave me sherbet to drink. He took me to the police station and asked me to get the names of Bachchu Singh and Balbhaddar Singh recorded, adding that otherwise I would be hanged and that he would defend me. When I reached the police station I felt as if intoxicated. I do not know what I got recorded in the report.

Teja said :

The day on which the Sub-Inspector visited my village, i. e., on Saturday, Badri Sah came to my house at midday and said ; 'Raghunath Singh names you. If you say what I ask you, I will get you released.' Thereupon I stated before the Deputy (Magistrate) what Badri Sah and the Sub-Inspector asked me to say. I do not know who committed the murder.

In the end both were discharged, there being, in the view of the Sessions Judge, not sufficient evidence against either of them.

After this the present appellants applied to the Magistrate to order the prosecution of Raghunath and Badri Sah. The Magistrate gave leave to prosecute under S. 211 of the Indian Penal Code, which is :

" Whoever, with intent to cause injury to any person, institutes or causes to be instituted, any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

And if such criminal proceeding be instituted on a false charge of an offence punishable with death, transportation for life, or imprisonment for life, or imprisonment for seven years or upwards, shall be punishable with imprisonment of either discription for a term which may extend to seven years, and shall also be liable to fine.

The Sessions Judge on appeal came to a different conclusion as regards Badri Sah, and quashed the leave given. He said in the course of his judgment :

I do not think it would be possible to prove that Badri Sah instigated the making of the charge.

The appeal was taken to the Commissioner, but he confirmed the determination of the Sessions Judge.

The appellants then raised the present civil suit for malicious prosecution. The crucial averment was that the respondent Badri Sah had tutored Raghunath and Teja to say what they did in their original confessions. Evidence was led before the Subordinate Judge. The facts which have already been detailed and as to which there could be no controversy were proved. Some other witnesses were examined, as to whose testimony there was controversy, with which their Lordships will presently deal.

Teja, bring examined, repeated his recantation of his original testimony, saying that Badri Sah had tutored him

But Raghunath reverted to his original account, saying that the story of the murder having been committed by the appellants with the assistance of Teja was true. The learned Subordinate Judge delivered an exceedingly careful judgment, and came to the conclusion that the plaintiffs, now appellants, had made out their case.

On appeal to the Court of the Judicial Commissioner of Oudh, the Judicial Commissioners reversed that judgment. Unfortunately, however, they took a completely wrong view of the law of the case. In their judgment they put the matter thus :

> In an action for malicious prosecution the plaintiff has to prove :
> (1) That he was prosecuted by the defendant.
> (2) That he was innocent of the charge upon which he was tried.
> (3) That the prosecution was instituted against him without any reasonable and probable cause.
> (4) That it was due to a malicious intention of the defendant, and not with a mere intention of carrying the law into effect.

Proposition (2), as stated, is quite erroneous. It should be

> That the proceedings complained of terminated in favour of the plaintiff if from their nature they were capable of so terminating.

This phraseology may be found in the judgment of Montague Smith, J., in *Basebe* v. *Matthews* (1). But the practice was in accordance with these words long before that case. Under the old forms of pleading a declaration, if the law were really as the Judges in this case defined it, would in all cases where there had not been an actual acquittal have been bad if there were not added the statement that the plaintiff was innocent of the crime charged. The reports may be searched in vain for any declaration so found bad, though there were many cases where prosecutions had terminated without acquittal. There was controversy as to what terminated proceedings, as, e. g., whether a nolle prosequi of the Attorney-General was a termination. But at any rate it was quite settled that a prosecution comes to an end when a Magistrate declines to commit. *Delegal* v. *High* (2), *Weston* v. *Beeman* (3), *Huntley* v. *Simson* (4). Accordingly in Bullen and Leake's Precedents, 8th Edn., at page 434, the regular form is given for an action for malicious prosecution when the plaintiff has been arrested and brought before a Magistrate. After narrating the arrest and the charge, it continues : "The said Justice having heard the said charge dismissed the same and discharged the plaintiff out of custody, whereupon the said proceedings terminated." In the present case it was sufficient for the appellants to prove, as they have done, that the criminal proceedings threatened on account of the disclosure contained in the confessions of Raghunath and Teja ended so far as they were concerned when the Sessions Judge finally refused to commit them for trial. That opened the way for the proof of the next proposition that the respondents had instigated the proceedings maliciously and without probable cause.

The result of the view of the law taken by the Judges was that the evidence was gone into with a view of saying whether the appellants had proved their innocence, and finally the learned Judges held that "the plaintiffs have failed to prove their innocence of the crime."

It is true that, having stated that "the two main issues in the case are : (1) whether the plaintiffs have proved themselves to be innocent of the charge of murder"; and (2) whether Badri Sah instigated Raghunath to implicate the plaintiffs falsely, they go on to consider this (2) which, taken by itself, is relevant but unfortunately their view on the second issue is permeated by their view on the first. Indeed, they say so themselves : "The two issues of the plaintiffs' innocence and Badri Sah's tutoring run into each other." Although, therefore, there are various comments on the evidence in the judgment which are of value, the mistaken view so permeates it as to make it impossible for their Lordships to confirm the judgment as it stands. They are consequently compelled to consider the judgment of the learned Subordinate Judge just as if the appeal had come direct from him to them. Their Lordships will now advert to the evidence given in addition to that which proved the facts which have been already set forth, and it will be convenient to separate that as to which there is no controversy from that as to which

(1) L. R. 2 C. P 684=36 L. J. M. C. 93=16 L. T. 417=15 W. R. 839.
(2) 3 Bing N. C. 950=5 Scott 154=8 Car and P. 444=3 Hodge 158=6 L. J. C. P. 337.
(3) 27 L. J. Ex. 57.
(4) 27 L. J. Ex. 134=6 W. R. 106=2 H. and N. 600.

controversy exists. It was clearly proved that between the appellants Balbhaddar and Bachchu, who are uncle and nephew on the one hand, and Badri Sah on the other, there was a long-standing and bitter enmity. They were the two principal families in the village and people of influence. The other persons who appear in the course of the case were all in very humble positions. This enmity had shown itself in litigations and prosecutions. Fines had been imposed and punishments inflicted, and there was a state of deadly feud between the two families :

On the night of the 17th a neighbour had heard a noise going on in Raghunath's house, and he had seen two men run out of the house and a light extinguished, but identification was out of the question.

So far as to matters which cannot be controverted. Next as to the evidence as to which there was controversy. Mt. Parbati, the mother of Sheo Bux, said that she remembered Teja coming for Sheo Bux, to go to Raghunath's house a little after nightfall. She then said that she got dinner ready and went to Raghunath's house to ask Sheo Bux to come back to dinner. She found there Sheo Bux, Balbhaddar Singh. Badri and Teja, all sitting together. In answer to her request Sheo Bux said he did not need dinner as he had eaten already, and that he would not come home ; he would take his turn as watchman. On the other hand, it is pointed out that this witness originally made no statement to the police. She was examined twice before the Magistrate, and on each occasion she said that the reason why Sheo Bux did not wish to dine was because he had already eaten yams. The post mortem disclosed that there was only pulse and rice in his stomach and not yams. Before the Sessions Judge she was again examined, and she then went back on the statement as to yams, and said that he had only eaten rice. It was her statement that led the Magistrate to issue a warrant for the apprehension of the appellants.

Badri Sah, the respondent, confirmed the statement that he was approached by Hazari, the father of Raghunath, and then by Raghunath, and that after hearing the story he went with them to the police station. He denied having seen Raghunath previously to the joint meeting between him and Hazari. Hazari, it may be noted, had died before the evidence was led in this case. But a schoolmaster deposed that he had seen Badri Sah and Raghunath talking together " in the morning." A man called Bikari said that a day before the confession he went to Badri Sah's house and that, as he approached from outside, he overheard Badri Sah say to Raghunath that if he would not leave out the names of Balbhaddar and Bachchu he would save him. On the other hand, there seems no particular reason for Bikari being at the house, He had a grudge against Badri Sah, and the whole story is contrary to the united story of Badri Sah and Raghunath of the first communication having been made when Hazari brought Raghunath to Badri Sah.

As already stated, the learned Subordinate Judge decreed in favour of the plaintiffs. Their Lordships wish to emphasize their appreciation of the carefulness and ability of the judgment. They have given every weight to the reasoning, although, as will be explained hereafter, they are not able to reach the same conclusion. The reasons which led the Subordinate Judge to reach his conclusions may be summarized thus ;

(1) Not only were the appellants not prosecuted after being brought up before the Magistrate, but the idea of their havmurdered Sheo Bux rests on no foundation. There was no enmity. Two motives were suggested. One a desire to get his house; but this is not really proved and, besides., the widow would still have had it. Second, a supposed intrigue between Sheo Bux's wife and Bachchu and also Raghunath. This is only suggested by Badri and Raghunath, and the idea of co-paramours plotting together to get rid of a husband is against human experience. Musammat Parbati's evidence was quite unreliable.

(2) The undoubted hatred of Badri Sah to Balbhaddar and Bachchu.

(3) Badri Sah was the person who suggested that Raghunath should go to the police station and confess.

(4) All through the various proceedings Badri Sah was always to the fore. He got his own pleader to undertake the defence of Raghunath. All he wanted was that the appellants should be convicted.

(5) There was no reason, if Raghunath had confessed to his father Hazari, that Hazari should have gone to Badri Sah.

(6) The Deputy Magistrate in the application for sanction under the Indian Penal Code took the view that Badri Sah had tutored Raghunath and Teja. (It is omitted to be stated that two Judges took the opposite view.)

(7) There was no reason for Teja making his first confession voluntarily. He was not in danger if he kept quiet. *Ergo* it seemed to be inspired by Badri Sah.

(8) Raghunath is utterly untrustworthy. He confessed, recanted and then re-confessed. Teja only once recanted and then adhered to it.

There is much in this reasoning, but what, in their Lordships' opinion, the learned Subordinate Judge has a little left out of view is that this is not a case which must be determined on a balance of probabilities. The question is not : Did the appellants commit the murder ? or, Did Badri Sah invent the murder against them ? the two queries exhausting the possibilities of the situation. The question is : Have the appellants proved that Badri Sah invented and instigated the whole proceedings for prosecution ? Of course there is nothing in the point which seems to have been taken in the Courts below, but which was not urged before their Lordships, that here de facto the appellants were not prosecuted by the respondent. In any country where, as in India, prosecution is not private, an action for malicious prosecution in the most literal sense of the word could not be raised against any private individual. But giving information to the authorities which naturally leads to prosecution is just the same thing. And if that is done and trouble caused an action will lie. But it must be kept in view that, so far as the police were concerned, there was ample cause for the initiation of prosecution proceedings. There were the clear narratives of two people, Raghunath and Teja, concurrent in all necessary particulars. The appellants must, therefore, go the whole way. There is no halfway point of rest. They must show that Badri Sah invented the whole story as far as it implicated the appellants, and tutored Raghunath and Teja to say it. That is a very heavy onus of proof, and unless they sustain it the appellants must fail.

Let the view which must be taken, if the appellants are to prevail, be analyzed. As to the fact of a murder there is no doubt. That the corpse of the murdered man was lying beneath the floor of Raghunath's cottage is also without doubt. One of the suggestions in Raghunath's evidence was that the corpse had been put there by somebody else and that he discovered its existence owing to the progress of putrefaction. This is an unlikely story, but it does not matter. Nobody supposes, nor was it suggested, that Badri Sah murdered Sheo Bux. His first knowledge of the existence of the corpse must have come from Ragunath, and whether Raghunath told him that he himself was implicated in the murder, or whether he merely told him he had found a corpse, is for the moment immaterial. For in either case Badri Sah must have, according to the theory, said to himself : "Now is my opportunity ; let me get my enemies implicated in the crime;" and this he is supposed to have done. He goes with Raghunath and Hazari—it is a pity that Hazari was dead before the evidence in the case, and there is no trace at all in the papers of his evidence before the Magistrate—and Raghunath makes his first confession. What is that confession ? It implicated himself and the appellants, but it also implicated Teja. Now it is very important to notice that Teja by all accounts had not met Raghunath and Badri Sah till after Raghunath's confession. For this is what he, Teja, says in his recantation, which is, of course, the foundation of the appellants' case :

> I did not call away Sheo Bux to Raghunath's house. The day on which the Sub-Inspector visited the village, that is, the Saturday, Badri Sah came to my house at midday, and said : 'Raghunath Singh names you. If you say what I ask you, I will get you released.' Thereupon I stated before the Deputy Magistrate what Badri Sah asked me to say.

What an extraordinary risk this was to tutor a confession which implicated not only his enemies but a man whom he had not yet interviewed, and why bring in Teja at all ?

It is, of course, quite useless to pin any faith to what Raghunath and Teja have said. Raghunath had executed a double somersault in confession, Teja a single one ; and yet, unless Teja'

confession is strictly true, the appellants' case is gone.

The argument was used: Why should Teja recant except to speak the truth? The answer is easy enough. The appellants had got off by not being committed for trial. Teja and Raghunath then wanted to save their own skins. No doubt Teja stuck to his recantation. Raghunath, who had by this time been let off, had no skin to save and recanted again. The very argument which has to be used to explain Teja's first confession may be used to explain his second. Fear was what prompted him, it is said, to make his first confession and implicate himself, though quite innocent: "Raghunath has mentioned you. You will be lost unless you say what I tell you." So fear would drive him to his second. "I have implicated myself foolishly. Let me now say I had nothing to do with it."

Lastly, as to Badri Sah's meddling with the case. That Hazari, if he was told the story by his son, would go to Badri Sah is likely enough. He would wish advice from some one in position, and Badri Sah was the only person except the incriminated men themselves. Further that when Badri Sah found that his enemies were implicated, he would be glad and would help to bring about their downfall is more than probable. But that is a different thing from being the sole author of it.

On the whole matter, therefore, their Lordships feel that while there is grave cause for suspicion, and while the whole truth in the case is impossible to find, there is not sufficient certainty in this doubtful matter to find that the appellants have discharged the heavy onus laid upon them. The result arrived at by the Judicial Commissioners on appeal was right, though the methods by which they reached that result were wrong,

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

Solicitor for Appellants—*S. L. Polak.*

Solicitors for Respondents—*Barrow Rogers & Nevill.*

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FROM CALCUTTA

12th March 1926

THE LORD CHANCELLOR, LORDS PARMOOR AND BLANESBURGH, SIR JOHN EDGE AND MR. AMEER ALI

Pursuttamdas Agarwala—Appellant.

v.

Gobind Prosad Agarwala and *others*—Respondents.

P. C. Appeal No. 135 of 1924, Bengal Appeal No. 45 of 1923.

Will—Construction.

The Will directed by Cl. 17 that out of the income of the testator's estate "a sum of Rs. 650 (subject to the increase hereinafter mentioned) be remitted monthly and every month by my executors or trustees to the managers for the time being of the mundir of Brindaban to be erected as aforesaid, out of which, sum of Rs. 100 shall be paid to" certain persons in succession; and then the clause continued, "and the residue or surplus shall be appropriated towards the expenses of performing pujas at or otherwise maintaining the said mundir and of the daily feeding of the poor there."

Then by Cl. 23 of the Will the testator said.

"I further direct that after paying the monthly dues and the monthly expenses hereinbefore directed to be paid or incurred and also after providing for the payment of taxes, Government revenue and assessments and repairs of my immovable property, and surplus of the rents, income and profits of my property and estate shall be monthly and every month remitted to Brindaban and applied in manner respecting the said monthly sum of Rs. 650, or so much thereof as is not required for the support of my family there, towards the performance of pujas and other religious ceremonies, and for the daily feeding of the poor at the mundir there."

The beneficiaries of the monthly sum of Rs. 100 named in this clause being all dead, the trusts declared of that monthly sum for the benefit of other persons not there named became inoperative, those persons not having been born in the the testator's lifetime.

It was contended that the effect of clause 23 was that a proportion of the residue bearing the same proportion to the whole as the Rs. 100 bore to the total sum of Rs. 650, became applicable for the support of the testator's family, described in Cl. 17, and that particular trust having failed, was undisposed of and passed to the testator's heirs.

Held: negativing the contention, that the clause in substance directed that the residue should be applied for the religious and charitable purposes referred to in Cl. 17, being the purposes applicable under that clause, applied to the residue of Rs. 650 per month after deducting the Rs. 100 per month, and that this view was supported by the words "subject to the increase hereinafter mentioned," contained in Cl. 17 and there was, therefore, no sum not disposed of by the Will. [P 53, C 2]

G. Lowndes and *G. D. McNair*—for Appellant.

L. DeGruyther and *E. B. Raikes*—for Respondents.

The Lord Chancellor.—This appeal raises a question as to the construction of the Will of Babulal Agarwalla, who died in the year 1873. The Will is in the English language and states (among other things) the testator's intention to erect a mundir and suitable buildings for the residence of members of his family and for the reception of poor and homeless persons at Sri Brindaban. Then by a clause, which has been referred to as Cl. 17, he directs that out of the income of his estate

> a sum of Rs. 650 (subject to the increase hereinafter mentioned) be remitted monthly and every month by my executors or trustees to the managers for the time being of the mundir of Brindaban to be erected as aforesaid out of which sum Rs. 100 shall be paid to

certain persons in succession; and then the clause continues:

> and the residue of surplus shall be appropriated towards the expenses of performing pujas at or otherwise maintaining the said mundir and of the daily feeding of the poor there:

The beneficiaries of the monthly sum of Rs. 100 named in this clause are all dead, and it is common ground that the trusts declared of that monthly sum for the benefit of other persons not there named is inoperative, those persons not having been born in the testator's lifetime. Then by Cl. 23 of the Will, the testator says this:

> I further direct that after paying the monthly sums and the monthly expenses hereinbefore directed to be paid or incurred and also after providing for the payment of taxes, Government revenue and assessments and repairs of my immovable property, the surplus of the rents, income and profits of my property and estate shall be monthly and every month remitted to Brindaban and applied in manner respecting the said monthly sum of Rs. 650, or so much thereof as is not required for the support of my family there, towards the performance of pujas and other religious ceremonies, and for the daily feeding of the poor at my mundir there.

Upon these clauses three points arise. The first question is whether the trusts of the sum of Rs. 100 per month having failed, that sum falls into the residue of the Rs. 650 a month and is applicable according to the trusts of Cl. 17. It is not necessary to decide that question, as it has been assumed throughout, and their Lordships will assume in favour of the appellant, that the Rs. 100 a month does not fall into that particular residue of which the trusts are declared by Cl. 17.

The second question is whether, assuming that to be so, the Rs. 100 a month falls into the the general residue which is disposed of by Cl. 23. In their Lordships' opinion it does. Cl. 23 is a general residuary clause, sweeping up all that is not disposed of by the previous clauses: and, accordingly, by virtue of the ordinary rule, the monthly sum of Rs. 100, assuming it not to be disposed of by Cl. 17, falls into the residue of which trusts are declared by Cl. 23.

Then a third question is raised: Cl. 23 directs the surplus to be:

> applied in manner respecting the said monthly sum of Rs. 650, or so much thereof as is not required for the support of my family there towards the performance of pujas and other religious ceremonies, and for the daily feeding of the poor at at my mundir there.

It is suggested on behalf of the appellant and, the learned Judge who first dealt with the matter was disposed to hold that the effect of that trust was that a proportion of the residue, bearing the same proportion to the whole as the Rs. 100 bore to the total sum of Rs. 650, became applicable for the support of the testator's family, described in Cl. 17, and that particular trust having failed, is undisposed of and passes to the testator's heirs. In their Lordships' opinion that is not the true effect of the clause. The clause in substance directs that the residue shall be applied for the religious and charitable purposes referred to in Cl. 17, being the purposes applicable under that clause applied to the residue of the Rs. 650 per month after deducting the Rs. 100 per month, and this view is supported by the words "subject to the increase hereinafter mentioned," contained in Cl. 17. The result is that, in their Lordships' opinion, there is no sum not disposed of by the Will, and, accordingly, that the judgment of the High Court at Calcutta is right and should be affirmed. Their Lordships will therefore humbly advise His Majesty that the appeal fails and should be dismissed with costs.

Appeal dismissed.

Solicitors for Appellant—*Morgan Price & Co.*

Solicitors for Respondents—*Watkins & Hunter.*

L. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar

** A. I. R. 1926 Privy Council 54

(*From Allahabad* : *A. I. R.* 1923 *All.* 109.)

15th March 1926

VISCOUNT DUNEDIN, LORD BLANESBURGH, SIR JOHN EDGE, AND MR. AMEER ALI.

Seth Lakhmi Chand—Appellant.

v.

Mt. Anandi and *others*—Respondents.

Privy Council Appeal No. 5 of 1925, in Allahabad Appeal No. 1 of 1920.

** *Hindu Law—Will—Joint family—Will by a member of his interest is invalid, but such an invalid Will can operate as family arrangement if consented to by all members.*

A Will by a member of a joint Hindu family of his interest is not a valid devise as a co-parcener's power of alienation is founded on his right to partition. That right dies with him, and the title of his co-sharers by survivorship vesting in them at the moment of his death, there remains nothing upon which the Will can operate : 8 *M. H. C. R.* 6, *Rel. on*; 5 *Bom.* 48, *Ref.* But a Will which does not operate as a Will at all is good evidence of a family arrangement contemporaneously made and acted upon by all the parties : 35 *All.* 337, *Foll.*

B and L, two brothers forming a joint Hindu family, executed a joint will whereby they agreed that A, wife of B, on the death of B, should have and enjoy for her life an interest in a moiety of the joint property equivalent to the interest which the widow of a sonless and separated Hindu would have in her deceased husband's estate.

Held : the Will although invalid as a Will was a good evidence of a family arrangement by consent of both the brothers and that the interest which A obtained by the mutual agreement of the brothers should continue for her benefit for her life, notwithstanding the birth, if it should happen, of "male issue" to L, as a co-sharer in a Mitakshara joint family without having obtained partition can with the consent of all his co-sharers mortgage or charge the share to which he would be entitled on a partition of the joint family property ; but the consent of all the co-sharers must be obtained ; and a father who is a co-sharer with a minor son cannot give such a consent for his minor son : 43 *All.* 228, *Rel. on* ; 3 *Beng. L.R.* 31 (*F.B.*), *Ref.* [P 55, C 2, P 56, C 1]

G. Lowndes and *E. B. Raikes*—for Appellant.

A. M. Dunne and *B. Dube*—for Respdts.

Sir John Edge.—This is an appeal from a decree, dated the 21st November 1922, of the High Court at Allahabad, which confirmed a decree, dated the 18th July 1919, of the Subordinate Judge of Meerut by which the suit had been dismissed. The suit had been instituted in the Court of the Subordinate Judge on the 5th June, 1918, and by the plaint in it the three following declarations were claimed :—

(*a*) The Will, dated 5th of June, 1915, and registered on the 9th of June 1915, executed by the plaintiff and Baldeo Sahai, deceased, on account of its being against the rules of succession under the Hindu Law, is absolutely invalid and null and void, and it has no effect upon the right of survivorship of the plaintiff in respect of the estate, business, the zamindari, landed and house properties, bonds, mortgage deeds, promissory notes, money-lending business with asams on account-books, parole debts, cash, gold and silver ornaments, conveyance, household and estate goods and articles of convenience and comfort, etc., of all kinds, belonging to the joint Hindu family.

(*b*) Defendant No. 1 now has and Defendants Nos. 2 to 5 will in future have no right of any kind in respect of the estate, business and zamindari properties, etc., given in relief A.

(*c*) The plaintiff is the owner in possession of the entire estate, business and zamindari properties, etc., given in relief A.

The document in respect of which the declarations are claimed is described in the plaint as a joint Will of Baldeo Sahai and the plaintiff, Seth Lakhmi Chand, and is in the written statement of Mt. Anandi, the first and principal defendant, described as an iqrarnama, that is an agreement.

The parties to the document in question were and the parties to the suit are Hindus, by caste Brahman Bohra, subject to the law of the Mitakshara of the school of Benares. The document in question was written by one Ram Chandar Sahai of Khatauli on stamped paper which had been purchased by Baldeo Sahai on the 5th June, 1915, and was signed and executed on the same day by Baldeo Sahai and his younger brother Lakhmi Chand, the plaintiff, in the presence of five men who signed the document as witnesses. It was presented for registration on the 8th June, 1915, at the office of the Sub-Registrar of Jansath, in the district of Muzaffarnagar, by Lakhmi Chand, who, having admitted in the presence of the Sub-Registrar the execution and completion of the document, it was registered on the 9th June 1915, by the Sub-Registrar.

Baldeo Sahai died on the 10th June 1915. He had had by a first wife, who had died before the 5th June 1915, a daughter, who was then dead and had left three minor sons who were living on the 5th June 1915, and are the Defendants 3, 4 and 5. Baldeo Sahai left surviving him his second wife, Mt. Anandi, who is the Defendant 1, and an unmarried daughter, who is Defendant 2. Baldeo Sahai had no son or other descendant of him. Lakhmi Chand had, on the 5th June 1915, five daughters living, but no

son. Baldeo Sahai and Lakhmi Chand were on the 5th June 1915, and until the death of Lakhmi Chand on the 10th June 1915, the sole co-sharers in a joint Hindu family. Baldeo Sahai was then over 40 years of age. (Here a copy of the Will was set out.) It has been held by the Subordinate Judge and by the High Court in appeal that the document in question was a valid Will of the two brothers. Whether it could operate as such will be presently considered.

It is now desirable to consider what was the position on the 5th June 1915, before the document in question was executed. The property to which the suit relates was of considerable value; it was valued for the purpose of jurisdiction, as appears by the plaint, at Rs. 1,00,000 (one lac). Baldeo Sahai was seriously ill and was not expected to recover. If he died as a member of the joint family his widow would be entitled to maintenance only, and the joint family property would vest in Lakhmi Chand by survivorship. If it could lawfully be agreed that the widow, Mt. Anandi, should on the death of Baldeo Sahai have and enjoy an interest in a moiety of the joint property equivalent to that of the widow of a sonless and separated Hindu, she would on the death of Baldeo Sahai be entitled for life as such widow to a moiety of all the profits of the immovable property, and to a moiety of all the profits of the movable property, which belonged to the joint family. On the 5th June 1915, Baldeo Sahai could have separated from Lakhmi Chand by one word and would have been entitled to a partition of all the joint family, and if he had separated his widow, Mt. Anandi, would on his death be entitled for her life as the widow of a sonless and separated Hindu to a Hindu widow's interest in the property, and on her death the property in which she would have a Hindu widow's interest would go to the person entitled to it on her death, who would not necessarily be Lakhmi Chand, or a descendant of him. There was some evidence that before the 5th June 1915, Baldeo Sahai was making preparation for a partition, but that need not now be considered; for, as the fact was, Baldeo Sahai and Lakhmi Chand did not separate but remained joint until Baldeo Sahai died on the 10th June 1915. But that the risk of a partition might at any moment occur and was in the contemplation of Baldeo Sahai and Lakhmi Chand when they executed the document of the 5th June 1915, is apparent from a perusal of that document.

It is admitted in the plaint that Baldeo Sahai fell seriously ill and desired

> "that after his death the name of his widow Defendant No. 1, should be entered in respect of his share in the joint property, and that after the death of the said widow his share in the property should devolve upon his daughter and daughter's sons,"

and that a document to effect that object should be executed, and that the plaintiff and Baldeo Sahai jointly executed the document in question "by way of a will." Baldeo Sahai could, from a legal point of view, have no interest in the joint property after he died. His interest in the joint property terminated with his life. What was meant by "his share in the joint property was a moiety of the joint property" which he would have had on a partition. After Baldeo Sahai's death Lakhmi Chand entered the name of Mt. Anandi in the revenue papers in respect of a moiety of the zamindari property.

The document in question could not, however, operate as a will. In *Vital Buttin* v. *Yamenamma* (1) the High Court at Madras held that a Will by a member of a joint Hindu family of his co-sharer's interest was not a valid devise. In *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (2), the Board, referring to that case stated that:—

> Its, the High Court's, reasons for making distinction between a gift and a devise are that the co-parcener's power of alienation is founded on his right to a partition: that that right dies with him; and that, the title of his co-sharers by survivorship vesting in them at the moment of his death, there remains nothing upon which the Will can operate.

It was held by the Board in *Brijraj Singh* v. *Sheodan Singh* (3) that a Will which did not operate as a Will at all was good evidence of a family arrangement contemporaneously made and acted upon by all the parties. In the present case their Lordships hold that the document of the 5th June 1915, is good evidence of a mutual agreement by Baldeo Sahai and Lakhmi Chand. What interest Mt. Anandi took under that mutual agreement is the only question which their Lordships need consider.

(1) 8 M. H. C. 6.
(2) [1879] 5 Bom. 48=7 I. A. 181=7 C. L. R. 320=4 Sar. 173 (P. C.).
(3) [1913] 35 All. 337=40 I. A. 161=25 M. L. J. 188 (P. C.).

It is well established law that a co-sharer in a Mitakshara joint family, without having obtained partition can with the consent of all his co-sharers mortgage or charge the share to which he would be entitled on a partition of the joint family property, but the consent of all the co-sharers must be obtained, and, as pointed out by Sir John Wallis C. J., in *Subbarama Reddi* v. *Ramamma* (4), a father who is a co sharer with a minor son cannot give such a consent for his minor son.

Their Lordships have come to the conclusion that the right of a co-sharer in a Mitakshara joint family property, who has obtained the consent of his co-sharers to charge his undivided share for his own separate purposes has long been recognised.

In 1869 in *Sadabhart Prasad Sahu* v. *Foolbash Koer* (5), which related to a Hindu joint family governed by the law of the Mitakshara, Sir Barnes Peacock, C. J., in delivering the judgment of a Full Bench of the Calcutta High Court consisting of himself and, Kemp, L. S. Jackson, Macpherson and Glover, JJ., held that a member of a joint Hindu family had no authority, without the consent of his co-sharers to mortgage his undivided share in a portion of the joint property, in order to raise money on his account and not for the benefit of the joint family. That implies that with the consent of all his co-sharers a member of a Hindu joint family can grant for his own purposes a valid mortgage of so much of the joint family property as would not exceed his share on partition. That principle that a member of a joint Hindu family can, with the consent of his co-sharers, charge for his own purposes the share in the joint family property which would come to him on a partition has been recognized by the Board in *Baijnath Prasad Singh* v. *Tej Bali Singh* (6), and cannot now be questioned as a principle of Hindu law. It appears to their Lordships that the same principle of the effect of the consent by the co-sharer applies in the present case and that Baldeo Sahai and Lakhmi Chand were competent to agree and did agree that Mt. Anandi should, on the death of Baldeo Singh, have and enjoy for her life an interest in a moiety of the joint property equivalent to the interest which the widow of a sonless and separated Hindu widow would have in her deceased husband's estate and that the interest which she obtained by the mutual agreement of Baldeo Sahai and Lakhmi Chand should continue for her benefit for her life, notwithstanding the birth, if it should happen, of "male issue" to Lakhmi Chand.

Their Lordships will humbly advise His Majesty that plaintiff is not entitled to any of the declarations claimed in the plaint, that the appeal should be dismissed with costs, and that the right of the person or persons who may claim to succeed the defendant Mt. Anandi on her death must be determined, if disputed, when the occasion arises, and not in this suit. *Appeal dismissed.*

Solicitors for Appellant—*T. L. Wilson & Co.*

Solicitors for Respondents—*Hy. S. L. Polak.*

(4) [1920] 43 Mad. 824=12 L. W. 249=(1920) M. W. N. 529.
(5) [1869] 3 B. L. R. 31=12 W. R. 1 (F. B.).
(6) [1921] 43 All 228=48 I. A. 195 (P. C.).

** A. I. R. 1926 Privy Council 56

(*From Patna*)

23rd March 1926

VISCOUNT DUNEDIN, LORD BLANESBURGH, SIR JOHN EDGE, AND MR. AMEER ALI.

Ganesh Lal Pandit and *others*—Appellants.

v.

Khetramohan Mahapatra and *others*—Respondents.

Privy Council Appeal No. 96 of 1923 in Patna Appeal No. 7 of 1922.

* (a) *Limitation Act* (15 *of* 1877), *Arts.* 66 *and* 132—*Suit on personal covenant to realize deficiency in mortgage debt—Art.* 66 *applies—Limitation Act* (1877), *Art.* 132.

When a mortgagee sues on a personal covenant to make the mortgagor responsible for any deficiency in the realisation of the mortgage debt out of the mortgaged properties, the claim is governed by Art. 66, and not Art 132. 7 *All.* 509 (*P.C.*), *Foll.* and 12 *Cal.* 389 *Ref.* [P. 57, C. 1]

** (b) *Hindu Law—Widow—Alienation—Decree against widow for contribution for arrears of revenue by co-sharers—Alienation by widow to satisfy decree—Reversioners are bound.*

Where a Hindu widow fails to pay her share of the Government revenue and after her death her co-sharer brings a suit for contribution and attaches her dwelling house in execution of the decree, any alienation made by the widow for satisfying the decree is binding on the reversioners : 25 *Cal.* 565, *Dist.* [P. 57, C. 1]

L. DeGruyther and *B. Dube*—for Appellants.

Mr. Ameer Ali.—Their Lordships are relieved of the necessity of narrating at length the facts of this complicated litigation, as the judgment under appeal summarizes very clearly the history of the transactions in debate.

This is an ex parte appeal from the judgment and decree of the High Court of Patna which partly affirmed and partly reversed the order of the Court of first instance.

A Hindu lady of the name of Suryamani, who died in 1904 or 1905, conveyed by mortgage and sale to one Behari Lal Pandit the father of the Defendant No. 1, almost the whole of the property which had devolved on her as the widow of one Banamali Mahapatra, a native of Orissa, subject to the Mitakshara law. Banamali appears to have died in the year 1863, leaving him surviving his widow, Suryamani. and two daughters, one of whom died not long after, childless ; the other Satyabhama survived her mother, and was the original plaintiff in the present suit, which was instituted in the Court of the Subordinate Judge of Cuttack on the 17th September, 1916. Satyabhama challenged in the action the validity of the transactions entered into between Suryamani and Behari Lal Pandit in respect of the properties conveyed to him by the widow. On Satyabhama's death her sons, the present respondents, were substituted in her place.

It is not disputed that Suryamani, on coming into possession of the properties left by her husband, had to meet heavy expenses connected with the litigation in which Banamali was involved. The High Court in its judgment, refers to the circumstances which compelled her to alienate many of the properties which formed the subject of controversy in the present case.

In respect of the others the learned Judges of the High Court, differing from the trial Judge, have held firstly that the documents which purported to create the alienations were not properly explained to the lady, that she was an ignorant purdanashin woman and had no independent advice ; and secondly, that some of the alienations challenged by the plaintiffs were either for debts that were barred or not binding on the reversioners. They have also held that the principal mortgage purporting to have been executed by Suryamani was not executed in compliance with the provisions of the law so as to make it binding on Suryamani.

It is with regard to these findings that the present appeal before the Board is concerned.

On the defendant's side it is alleged that on the 23rd July, 1884, Suryamani entered into two transactions with Behari Lal Pandit : one was a mortgage for Rs. 30,500, the other a sale to him of certain properties for Rs. 8,000. The sale deed is marked in the proceedings as Exhibit Q 6, and the deed of mortgage as Exhibit M.

In 1896 Behari Lal Pandit instituted a suit against Suryamani and her daughter Satyabhama for enforcement of the mortgage. On the 28th August, 1896, Behari Lal Pandit obtained an ex parte decree.

Their Lordships do not think it necessary to refer to the steps taken by the ladies to set aside the ex parte decree ; it is enough to say that they failed in those proceedings and on the 25th and 26th August, 1897, the mortgage decree was executed, and the mortgaged properties were put up for sale and purchased by Behari Lal himself for Rs. 33,000. odd. At the time of the sale the mortgage debt amounted to something like Rs. 80,000. In order to pay the balance of the mortgage debt Suryamani entered into a razinama or deed of compromise by which she agreed to transfer to Behari Lal her remaining properties in her hands belonging to the estate of her husband. In pursuance of this razinama she appears to have executed in 1899 a number of conveyances which are marked in the proceedings as Q., Q 1, Q2, Q. 3 and Q4. Q5, executed about the same time, stands in a different category.

As already stated Satyabhama, and after her death, the plaintiffs, as reversioners to Banamali's estate, challenged the sale deed of the 23rd July,1884, by which Behari Lal purchased some of the property on the 23rd July, 1884. They also challenged the mortgage deed of the same date and the transactions of 1899, evidenced by Exhibits Q., Q1, Q2, Q3, Q 4 and Q 5.

The learned Judges of the High Court have held that the defendants had established legal necessity in respect of the mortgage of the 23rd July, 1884, and that consequently the sale under the mortgage decree was valid, but that they had

failed to satisfy that the sale of the 23rd July 1884, Q 6, was for justifiable necessity, or that she had in fact executed the sale deed, or that it was read over and explained to Suryamani, and that apart from that she had no independent advice. They also held that the kabalas executed by the widow in 1899, were not binding on the reversioners.

In their Lordships' opinion the evidence fully justifies the conclusions of the learned Judges. The deed of sale (Q 6) was executed for Suryamani by a person of the name of Lakhan Mahanty, under a power of attorney which bears date the 29th of July 1884, six days after the sale in question. The substance of the powers entrusted to Lakhan as set out in the Register of powers of attorney of 1884, was given. It will be noticed that this power was registered on the 29th of July, whilst the sale was effected on the 23rd. Neither of the two witnesses to the execution of the power was examined. Under the Registration Act of 1877 the same provisions are made as under the Act now in force for safeguarding the interests of absent executants of documents when presented for registration by a person claiming to act by and under their alleged authority. S. 32 provides that.

> every document to be registered under the Act, whether such a registration be compulsory or optional, shall be presented by such person executing or claiming under the same, . . . or by the representative or assignee of such person or by the agent of such person represented or assignee *duly authorized* by power of attorney *duly* executed and authenticated in the manner hereinafter mentioned.

Their Lordships concur with the High Court in holding that the sale-deed of the 23rd July 1884, which purported to be executed by Lakhan Mahanty for Suryamani was not validly executed, and that the sale thereunder could not bind either Suryamani or the reversioners.

As regards the kabalas by which Suryamani purported to transfer her remaining properties to Behari Lal Pandit in discharge of the balance remaining over after the sale under the mortgage decree, their Lordships also agree with the High Court that the claim on the personal covenant for the balance of the mortgage debt was barred by the statute of limitation (XV of 1877), long before the execution of the razinama and the conveyances thereunder. It will be noticed that the mortgage of the 23rd July 1884, by which Suryamani borrowed Rs. 30,500 from Behari Lal Pandit on interest at the rate of 1 per cent per mensem was repayable by her within six months from the date of the execution of the document. The covenant on her failure to repay is as follows:

> If I fail to pay the whole of the principal and interest within the aforesaid term the creditor is competent to sue me in the Court and realize the principal with interest thereon at the rate of Re. 1 per cent. per mensem from this day till the date of realization and costs of the suit from me and from the mortgaged properties, and, if insufficient, from my other moveable and immovable properties.

The decree on this mortgage, Ex. T (1), made on the 28th August, 1896, was in the following terms:

> This suit is for recovery of the principal of Rs. 33,500-0-0 and the balance of interest of Rs. 47,228-8-0, in all Rs. 80,728-8-0, and the interest which will accrue from the date of institution of the suit till that of realization and the costs of the suit from the defendant, and if not fully realized from her then from the mortgage properties, except those exempted from mortgage liability at the request of the Defendant No. 1 by putting them up for sale and if insufficient the balance be realized from the surety, Defendant No. 2, and her properties.

The suit on the mortgage bond was not instituted until ten years after the debt became repayable. The decree for the balance, if the sale of the mortgaged properties proved insufficient, was against Satyabhama, who had stood as surety on the mortgage. Satyabhama was afterwards absolved from all liability as surety in the High Court. In the case of *Ramdin* v. *Kalka Prasad* (1) it was held by the Judicial Committee that when a mortgagee sues on a personal covenant to make the mortgagor responsible for any deficiency in the realization of the mortgage debt out of the mortgaged properties, the claim would be barred in three years. That case arose under the Limitation Act of 1871 (IX of 1871) and the same argument which has been advanced in the present case was submitted to the Board. Their Lordships in that case held as follows:

> The second schedule places simple money demands generally under the three years' limitation, and under No. 65 the same limitation is applied to a simple bond, and under the same limitation are placed bills of exchange, arrears of rent and suits by mortgagors to recover

(1) [1884] 7 All. 509=12 I. A. 12=4 Sar. 619 (P. C.).

surplus from mortgagee. The six years' limit embraced suits on foreign judgments and some compound registered securities. The twelve years' period is made applicable principally to suits in respect of immovable property, though it also applies to judgments and recognizances in India. But the counsel for the appellant relied upon the language of the 132nd article of the second schedule; "For money charged upon immovable property, twelve years." His contention was that that period of twelve years applied to every remedy which the instrument carried with it, and gave twelve years for the personal remedy against the mortgagor as well as against the mortgaged property.

The Judicial Committee expressly overruled the contention that a claim for the balance of the mortgage debt based on the personal covenant came under Article 132 of Schedule II applicable to claims for money "charged on immovable property."

That case was followed by the High Court of Calcutta in *Miller* v. *Runga Nath Mullick* (2) which arose under Act XV of 1877. There the learned Judges held as follows:

We are of opinion that the decision of the lower Court upon the question of limitation is correct. The contention of the learned counsel for the appellant that Article 132 of Schedule II of the Limitation Act of 1877 refers to a claim to recover money charged upon immovable property, quite irrespective of the remedy asked for, has been set at rest by the decision of the Judicial Committee of the Privy Council in the case of *Ramdin* v. *Kalka Pershad* (1). That decision was passed with reference to the corresponding article of the Limitation Act of 1871. That article provides a period of twelve years for suits of money charged upon immovable property. The Legislature in the present Limitation Act has used a different phraseology, viz., "to enforce payment of money charged upon immovable property." The language of the present Act, viz., "to enforce, etc.," is more in favour of the contention that the article in question refers only to suits "to enforce payment of money charged upon immovable property" by the sale of the said property. This construction was put by the Judicial Committee of the Privy Council upon Article 132 of the Limitation Act of 1871, the language of which did not suggest it so clearly as that of the present Limitation Act. The claim to make the defendants personally liable has therefore been rightly held to be barred by limitation, the present suit having been commenced more than six years after the accrual of the cause of action.

Article 65 of the Second Schedule (Act IX of 1871) is reproduced in Act XV of 1877 as Article 66.

Their Lordships are of opinion that the view taken by the High Court on the question of limitation is well founded. The cause of action on the personal covenant accrued to Behari Lal Pandit when Suryamani failed to pay the mortgage debt, viz., within six months from the date of the mortgage. And the claim had become barred under Article 66 long before the execution of the razinama and the conveyances thereunder. Consequently it is not necessary to consider whether a decree under S. 90 of the Transfer of Property Act of 1882, is requisite in case of deficiency in the realization from the mortgaged property. Admittedly no decree was asked for or made. S. 90 is now O. 34, R. 6, of the Civil P. C. of 1908.

As regards the consideration for Exhibit Q 5, which was a conveyance executed by Suryamani in favour of Behari Lal Pandit on the 25th November 1899, it appears that Suryamani became liable for her arrears of Government revenue under Act XI of 1859 in respect of a mouzah which she held in her husband's estate with other co-sharers. To save the property from sale under the Act the co-sharers paid the revenue due from her and sued her for contribution. They obtained a decree and attached her dwelling house for the satisfaction of the debt. This is recited in Exhibit Q 5, the kabala by which she conveyed the property now claimed by the reversioners.

The learned Judges of the High Court, relying on the case of *Upendra Lal Mukherji* v. *Girindra Nath Mukherji* (3) have held that where the Hindu widow fails to pay her share of the Government revenue and after her death her co-sharer brings a suit for contribution, the reversionary heirs of her husband's estate were not bound to satisfy the debt. But in the present case it has been found as a fact by the Subordinate Judge that the co-sharers had, in execution of their decrees for contribution, attached Suryamani's dwelling house, and that in consequence thereof she was compelled to raise money by executing the kabala Exhibit Q 5.

Their Lordships are of opinion that sufficient evidence has thus been given by the defendants to show that there was a compelling necessity on the part of the widow for entering into this transaction. They accordingly vary the decree of the High Court by deleting the transaction covered by the deed of sale, Exhibit Q 5. In other respects the

(2) [1885] 12 Cal. 389.

(3) [1898] 25 Cal. 565=2 C. W. N. 425.

decree and judgment appealed against will be confirmed and the appeal will be dismissed. As there is no appearance on behalf of the respondents it will be without costs.

And their Lordships will humbly recommend His Majesty accordingly.

Decree varied.

Solicitors for Appellant — *Watkins* and *Hunter*.

Respondents—*Ex parte*.

⁂ A. I. R. 1926 Privy Council 60

(*From Patna*)

10th May 1926

LORDS BLANESBURGH AND DARLING, SIR JOHN EDGE, MR. AMEER ALI AND LORD SALVESEN.

(Raja) Dhakeshwar Prasad Narain Singh—Appellant.

v.

Mt. Gulab Kuer and *others*—Respondents.

Privy Council Appeal No. 98 of 1924; Patna Appeal No. 30 of 1923.

⁂ (*a*) *Bengal Tenancy Act*, S. 120—'*Bakasht*' *conveys the same meaning as khudkhasht—It might imply raiyati lands temporarily come into possession of landlord and under his cultivation—Land tenure.*

The term 'bakasht,' invented by the revenue officers to meet a certain contingency, conveys to all intents and purposes the same meaning as khudkasht, which is admittedly the same as sir or zerait. It might, however, imply raiyati lands that had temporarily come into the possession of the landlord and were temporarily under cultivation. [P 64 C 1]

⁂ (*b*) *Limitation Act, Art.* 14—*Action in ejectment—Main purpose being to recover possession on the strength of record of rights article does not apply.*

A suit for possession on the strength of entries in record of rights which were challenged by defendant, is not one brought for the purpose of setting aside any order of the revenue Court, but it is simply an action in ejectment, its main purpose being to recover possession of certain lands allotted to the plaintiff, and Art. 14 does not therefore apply to such a case. [P 64 C 2]

A. M. Dunne, E, B. Raikes, K. A. Afzal—for Appellant.

B. Dube—for Respondents.

Mr. Ameer Ali.—This is an appeal from a judgment and decree of the High Court of Patna pronounced on the 18th June, 1923, which, reversing the decree of the Subordinate Judge, made on the 26th May, 1920, dismissed the plaintiff's suit.

The action is for the possession of some lands lying in a village, or, rather, in a conglomeration of village and hamlets, called collectively Mouzah Katauna, situated in parganah Bihar, district Patna. In this district propietary rights are often split up amongst numbers of owners and frequently run into very small fractions. The present case furnishes not only an illustration of the infinity of sub-division, but also of the inconvenience to revenue officers in dealing with the shares. Until its partition in 1914, to which reference will be made particularly later on, Mouzah Katauna bore one tauzi number (10905) and paid to the Government a consolidated jama (revenue) of Rs. 1,542. The mouzah was held by a number of proprietors (maliks) in specific but undivided shares. Apparently, when the partition was started there were some fourteen sets of co-sharers. The plaintiff owned a little over 4 annas or one-fourth; whilst one Munshi Bakhori Lal, now deceased, the husband of the first defendant, held an anna and a fraction. Besides his proprietary or milkiat interest in the village, he owned a mokurrari, or permanent tenure, and some lands which were in his direct cultivation.

It should be observed here that besides Bakhori Lal, the other maliks also held possession, in proportion to their milkiat shares, the same class of lands which appear to have been called minhai khudkasht—minhai because the lands by private arrangement among the co-sharer-proprietors had been exempted from payment of rent and khudkasht because they were the owner's "private lands." The definition of the zamindar's "private lands" in S. 120 of the Bengal Tenancy Act (VIII of 1885) will be referred to later.

It is to these lands held by Bakhori Lal that the present dispute relates.

Long before the Government resolved to institute a survey and have a record of rights prepared under Chapter X of the Bengal Tenancy Act, preliminary to a partition among the several maliks, Bakhori Lal had parted with almost the whole of his proprietary rights and

interests in the village. The fractional share he retained was held ijmali with the purchasers.

To the sale-deeds their Lordships will refer later, as they throw considerable light on the question for determination in this appeal.

This joint holding appears to have been maintained by the Batwara officer.

The survey settlement officer, on the conclusion of the record of rights, made an entry under S. 103 B, as follows (omitting the boundaries of the plots):—

SURVEY KHATIAN OF VILLAGE KATAUNA

Village—Katauna No. 307.

Estate — Mohamoodpur Bhaidi, Mohanpur Bhaidi, Ugarsenpur Bhaidi, Rajpur Bhaidi, otherwise called Katauna.

Tauzi No.—10905.

Patti.—Katauna.

Name of proprietor and number in proprietary Khewat —Babu Dhakesar Parsad Narain Singh alias B. Harihar Prasad Narain Singh and others Khewat No. 3.

Name of tenure-holder and number in tenure-holder's Khewat, if any — Shamilat Bakhori Lal and others recorded in Khewat No. 14.

Bakasht of Malik and others	3598	Paddy 4 Kitas.	31	30	In possession of Bakhori Lal with field.			
	3625	Do.	16	26	In possession of Bakhori Lal.			

It will be noticed that in the above entry Bakhori Lal is described as tenure-holder and the lands are stated to be in his direct cultivation. There is no mention of any raiyati kasht. The two Plots No. 3598 and No. 3625 appear to have been included by the survey officer in the plaintiff's property,

Broadly speaking, the Bengal Tenancy Act classifies agricultural lands under two heads: (1) Raiyati lands, in respect of which a raiyat acquires a right of occupancy which is explained in Chapter V; and (2) lands which are held by the malik or owner, in his own direct cultivation, and are called in the Act the "private lands" of the zamindar. In these lands the raiyat cannot acquire a right of occupancy.

The zamindar's "private lands" are dealt with in Chapter XI under the heading of "non-accrual of occupancy rights, etc., S. 116 (as amended by the Bengal Act I of 1907) provides:

"Nothing in Chapter V shall confer a right o occupancy in, and nothing in Chapter VI shall apply to

[lands acquired under the Land Acquisition Act, 1894, for the Government or for the Local Authority or for a Railway Company, or lands belonging to the Government within a Cantonment, while such lands remained the property of the Government, or of any Local Authority or Railway Company, or to]

a proprietor's private lands known in Bengal as khamar, nij or nijjot [and in Bihar as zirdat, nij, sir or khamat], where any such land is held under a lease for a term of years or under a lease from year to year.

Then dealing with the powers of a revenue officer appointed in any particular locality to make a survey of the proprietor's "private lands," it is provided by S. 120:

"(1) The Revenue Officer shall record as a proprietor's private land;

(a) land which is proved to have been cultivated as khamar [zirdat, sir,] nij, nijjot [or kamat] by the proprietor himself with his own stock or by his own servants or by hired labour for twelve continuous years immediately before the passing of this Act, and

(b) cultivated land which is recognized by village usage as proprietor's khamar [zirdat, sir] nij, nijjot, [or kamat].

"(2) In determining whether any other land ought to be recorded as a proprietor's private land, the officer shall have regard to local custom and to the question whether the land was, before the second day of March 1883, specifically let as proprietor's private land, and to any other evidence that may be produced; but shall presume that land is not a proprietor's private land until the contrary is shown."

It is evident from the present record that besides the words sir and zerait the term khudkasht is in common use in this part of Bihar as a synonym of sir. Khudkasht literally means "one's own cultivation."

It appears that a new designation has sprung up in Bihar, in the course of proceedings under the Partition Act (V of 1897) and in the Record of Rights Survey the revenue officers found in the landlord's possession, and under their cultivation, lands in regard to which it was difficult to ascertain whether they were sir or zerait, or whether they were raiyati lands temporarily in the possession of the zamindar. These officers appear to have solved the difficulty by inventing a new designation for this kind of lands. They called it bakasht The word bakasht literally means "in the cultivation of," and when the word malik is added to it, the difference between khudkasht and ba-kasht-i-malik becomes very slight.

The idea was apparently to leave it to the civil Courts to find out on the evidence of the parties the origin and nature of the lands held by the zamindar as bakasht.

The question now presented for the determination of the Board relates to the interpretation to be attached to the entry in the Record of Rights, Shortly after the survey the partition proceedings in the present case followed, They were long drawn and complicated, and their Lordships are not surprised that the Batwara officer was bewildered. There were fourteen parties represented by nine pleaders and legal practitioners. The present defendant (Gulab Kuer) and the vendees of her husband claimed to have the sixty-seven bighas of bakasht lands in a single takhta.

On the 14th September 1914, the Batwara officer made the following order, which their Lordships consider should be set out in full :

"14-9-14 :

"Read petition No. dated 12-9-14 filed by Mt. Gulab Kuer, wife of Bakhori Lal. Also petition on behalf of parties I, III ; V and XIII filed, petitions rejected.

"I have heard the parties at great length. The Bakasht lands of about 67 Bighas which have been entered in the Record-of-Rights as being in possession of the Ijmal Maliks (Bakhori Lal) has been assessed to rent under S. 3. XV, of the Batwara Act. It is doubtful if S. 77, Act V of 1897, will apply to the case ; of the Bakasht lands of 67 Bigeas of Ijmal party as the explanation to S. 77, seems to exclude all Khanear lands, etc., and to apply to Raiyati lands as only. These lands were original Raiyati lands as was admitted by Bakhori Lal in his deposition in the civil Court in Case No. 54 of 1891 (Munsiff of Bihar). These Bakasht lands of 67 Bighas and odd of party Ijmal were evidently in this original Raiyati land. The Roadcess return of 1894 supports this view. S, 22, Cl. 2, of the Bengal Tenancy Act will apply In this case ; so far as I can make out these lands will retain this Raiyati character subject to payment of rent assessed thereupon by me, in case these lands fall outside the Takhta of Ijmal. The point is not free from doubt and the question can only be finally decided by the civil Court."

I. Mr. S. Gupta, Vakil.
II. Mr. Ambika Pd., Bar-at-law.
III. M. S. Gupta.
IV. M. S Gupta.
V. M. S. Gupta.
VI.
VII. Tika Singh.
VIII.
IX.
X.
XI. Beni Pd.
XII. Jang Bahadur Singh.
XIII. Mr. S. Gupta.
Ej. Gopalji.

Their Lordships desire to lay proper emphasis on this passage :

"The Batwara officer continues thus ;—I have followed the Record-of-Rights and applied the [Batwara law (S. 3, XV·(6)] upon it. I will give Takhta to Ijmal according to his share in Reg. D and Ijmal has been recorded as Bakasht Malik in 67 Bighas 11 Katthas 15 Dhurs of Khudkasht lands as shown in Amin's report of khudkasht lands. S. 77, Act V of 1897, will not apply to this 67 bighas 11 katthas 15 dhurs of khud (?) land of Ijmal party. This is to be governed by S. 22 of the Bengal Tenancy Act.

"I have heard all the objections urged before me.

"Plots Nos. 7362—7362 (?) to go to Ijmal as they are in possession of Bakhori Lal."

Then followed a series of petitions and expostulations on the part of Gulab Kuer. She claimed that the lands of which a part had been allotted to the plaintiff were her husband's bakasht lands of which he had been long in possession, and that the Batwara officer had no power to assess rent thereon.

Her contention went in appeal after successive stages to the Board of Revenue, and was dismissed by the revenue authorities in succession. Throughout the proceedings in the revenue Courts she never appears to have taken her stand on the claim that those lands formed part of a raiyati kasht. In the result the takhta allotted to the plaintiff included some 47 bighas of the lands which were held by Bakhori Lal "in his own cultivation." The plaintiff thereupon attempted to take possession of the same ; he was resisted, which led to criminal proceedings in the Magistrate's Court. As the defendant was in possession of the lands in dispute, the plaintiff was referred to assert his right in the civil Court. Accordingly, he brought this action on the 4th February 1919, in the Second Court of the Subordinate Judge of Patna.

The defendants in the action are Gulab Kuer, the widow of Bakhori Lal, his daughter, and the daughter's son, Gopalji, who is the reversioner to Bakhori's estate.

The Defendant No. 1 alleged, in her written statement, that the lands in suit had always been held by her husband for many years past as a raiyati holding, and that the Batwara officer's award was illegal. With reference to the previous statements regarding the khudkasht or bakasht nature of the lands, she made this further allegation :

As during the survey the husband of this Defendant No. 1 being very old could not personally look after the survey proceedings and moreover as he had also become the proprietor of a fractional share in Mauza Katauna aforesaid, the survey authorities wrongly and in utter disregard of the legal aspect recorded the disputed land constituting his raiyati kasht as his bakasht land, although the said land had been his raiyati kasht for a long time.

The question for determination thus narrowed itself to two issues ; first, whether the entry in the record of rights was correct ; and, secondly, what was meant by bakasht lands.

In other words, were the bakasht lands, as the defendant contended, Bakhori Lal's raiyati kasht ? The Subordinate Judge held that the defendant was bound by the entry in the record of rights, and that the lands were the *sir* lands of Bakhori Lal, and that the allotment to plaintiff was valid. He also held that the receipts and *luggit* statements adduced by the defendant to establish her allegation that the lands were a raiyati kasht were not genuine. He considered them to be unworthy of credit, for reasons he stated in his judgment. He accordingly made a decree in favour of the plaintiff. The defendants appealed to the High Court of Patna. The learned Judges, differing from the first Court, reversed its order and dismissed the plaintiff's suit.

Mr. Justice Ross was of opinion that S. 22 (Cl. 2) of the Bengal Tenancy Act, as amended by Act I of 1907, applied to the case. He also relied on the receipt and *luggits* produced by the defendant, and came to the conclusion that the lands held by the defendant's husband formed a raiyati kasht. Mr. Justice Jwala Prasad, in his judgment, dealt with the case from a different point of view. He proceeded on different premises, but came to the same conclusion—that the expression "bakasht" in this case denoted a raiyati kasht. The learned Judges accordingly dismissed the plaintiff's suit for the actual or khas possession of the lands allotted to him. Hence this appeal to His Majesty in Council.

Before dealing with the point at issue their Lordships desire to observe that S. 22 (2) of the Bengal Tenancy Act, which has been held by the High Court to apply to the subject-matter of the suit, runs as follows :

If the occupancy-right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, he shall be entitled to hold the land subject to the payment to his co-proprietors or joint permanent tenure-holders of the shares of the rent which may be from time to time payable to them ; and, if such transferee sub-lets the land to a third person, such third person shall be deemed to be a tenure holder or a raiyat, as the case may be, in respect of the land.

It can only apply on the assumption that an occupancy right existed in the lands, which right is transferred to a person jointly interested ; in other words, that a raiyati kasht existed in fact. In the present case the raiyati right is in controversy, and consequently the section has no application until the claim is established.

With regard to the view expressed by Mr. Justice Jwala Prasad, it is enough to observe that although the Batwara officer, following the survey officer, declared the lands held by Bakhori Lal to be kasht lands, and although the Batwara officer stated dubitante that Bakhori Lal at one time had stated he held a raiyati kasht, the entry, in fact, records the lands to be bakasht lands. So far as this declaration is concerned the entry made by the survey officer under S. 103-B. Cl. 3, is to be assumed to be correct until the contrary is proved. The defendant Gulab Kuer has challenged its correctness. The question is : Has she established her allegation ?

Bakhori Lal, as already stated, conveyed to a number of persons, by several deeds of sale, shares of his milkiat or proprietary interest which he possessed in the village. In the kabala executed by him to one Dundi Sahu, on the 13th September 1888, after reciting the share he was conveying, he states what he does not include under the sale in the following terms :

With the exception of jagir lands.etc., and lands excepted under the Muhammadan Law and by the standing customs as well as of the minhai khudkasht lands which have been partitioned among the 16-annas co-sharers in proportion to their shares.

In another document executed on the 29th March 1890, in favour of one Bhintoman Singh, he excepts from the sale the khudkasht lands, known as minhai land, to the extent of the share allotted under private partition among the 16-annas co-sharers.

In another document of the same date executed in favour of Nilkanth Singh, the following passage is embodied:

Be it known that the said purchaser has willingly agreed to exclude in proportion to the share sold the khudkasht land called minhai land partitioned by the 16 as. co-sharers. To this the said purchaser or his heirs or representatives shall have no claim or contention.

The same exception is made in other conveyances.

It is to be observed here that a large area of khudkasht lands in this village have been partitioned among the co-sharers, which, as already stated, being exempted from payment of rent, are called minhai. There is absolutely nothing to show on the evidence to what other lands these clauses in the deeds of sale relate.

Their Lordships have no doubt that when Bakhori Lal excluded from his sale khudkasht lands, he was referring to lands which he had under his own cultivation, described in the record of rights and the Batwara khatian as bakasht lands.

The term "bakasht," invented by the revenue officers to meet a certain contingency, conveys to all intents and purposes the same meaning as khudkasht, which is admittedly the same as *sir* or zerait. It might, however, imply raiyati lands that had temporarily come into the possession of the landlord and were temporarily under his cultivation. In the present case, however, there is no evidence, and certainly nothing is brought to their Lordships' notice, to show to whom the alleged raiyati kasht belonged, or when it came into the possession of Bakhori Lal. The defendants' allegation accordingly is not established. Some stress is laid in the judgment appealed against on the fact that the Batwara officer assessed rent on the lands allotted to the plaintiff as indicating that he regarded it as a raiyati holding. S. 3, Cl. 15, of Act V of 1897, to which reference is made, empowers the partitioning officer, for the purpose of equalizing the allotment, to assess the rents on the lands allotted. Clause 15 defines "assets" as follows: "Assets, when used with reference to land, means:

(a) In the case of land held by cultivating raiyats, the rent payable by them.

(b) In the case of land which is occupied by a proprietor, the rent which might reasonably be expected to be payable by cultivating raiyats if the land were occupied by them.

This has, in their Lordships' opinion, nothing to do with the fixing or assessment of rent when a raiyati kasht falls within the allotment of a proprietor. That question appears to be dealt with by other sections.

With regard to the objection put forward by counsel for the respondents, that the plaintiff's suit is barred under Article 14, Schedule 1, of the Limitation Act, their Lordships desire to observe that this suit is not brought for the purpose of setting aside any order of the revenue Court; it is simply an action in ejectment, its main purpose being to recover possession of cartain lands allotted to the plaintiff.

On the whole, their Lordships are of opinion that this appeal should be allowed, the decree of the High Court should be reversed, and that of the Subordinate Judge restored with costs.

And their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors for Appellant—*W. W. Box and Co.*

Solicitors for Respondents—*R. Ford and Chester.*

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(*From Madras: A. I. R.* 1923 *Mad.* 344.)

6th May 1926.

LORD PARMOOR, BLANESBURGH AND DARLING, SIR JOHN EDGE AND MR. AMEER ALI.

(*Nattu*) *Kesava Mudaliar*—Appellant.

v.

V. S. Govindachariar and *others*—Respondents.

Privy Council Appeal No. 83 of 19

Contract Act, S. 23—Agreement between two temples restricting and regulating each other's rights to take out processions—Common legal rights of parties will prevail.

Where two temples entered into an agreement by which each other's rights of taking out processions were restricted and defined :

Held, since all the religious processions are under the control of the police, and are all, subject to such control, equally lawful, the agreement cannot take away from any party any right that it may have generally subject to police control. [P 67 C 2]

G. Lowndes and *E. B. Raikes*—for Appellant.

L. De Gruyther and *K. V. L. Narasimham*—for Respondents.

Lord Blanesburgh.—The suit out of which this appeal arises was instituted on the original side of the High Court at Madras by the appellant and another, since deceased, the two dharmakartas or trustees of a temple at Mylapore. The object of the suit was to establish by declaration and consequential injunction against the defendants, the trustees of an adjoining temple, the plaintiffs' alleged rights under an agreement stated to have been entered into on the 26th January 1846, by the then trustee of the defendants' temple.

There were many defences raised to the suit, both technical and substantial, but the learned trial Judge, Mr. Justice Phillips, accepting the plaintiff's construction of the document sued on as correct—and no other construction was apparently suggested to him by the defendants—repelled all these defences and by a judgment, dated the 18th February 1921, in substance decreed the suit. The respondents appealed to the High Court on its appellate side, and there raised a question of construction on which the decision of that Court ultimately turned. By a decree and judgment (reported in *A.I.R.* 1923 *Mad.* 344—*Ed.*) of the 4th September, 1922, of the Chief Justice, Sir Walter Schwabe and Mr. Justice Wallace, who composed the Court, the decree of the trial Judge was reversed and the suit dismissed, for the reason that the plaintiffs had, in the opinion of the Court, misconstrued the agreement sued on, and were not entitled in the circumstances to any relief at all. Dismissing the suit on that ground, the learned Judges in terms refrained from pronouncing any opinion upon the sufficiency or otherwise of the defences set up by the defendants as a further answer to it. The surviving plaintiff appeals.

The appellant's temple is known as the Audikesavaperumal Peyalwar Temple, and is of great antiquity. In these proceedings it has been referred to as the "Y" temple. The respondents' temple is known as the Sri Vedanta Desikar Temple. It was built in or shortly after 1832. In these proceedings it has been referred to as the "U" temple. The two temples about on the same street in Madras, and their entrances are within a few yards of each other. They belong to rival sects, and owing to the fact that the ritual of each involves many processions, the preliminary ceremonies of which have to be performed in the street while their recurring celebrations frequently occur on the same day, it follows that the services of both temples in their completeness can only be carried out without inconvenience, friction and confusion to both sets of worshippers if there be present either a spirit of mutual accommodation or the exercise of some degree of external control.

The appellant's "Y" temple is not only the older ; it is also the more important institution of the two. In 1846, at the date of the agreement in suit, the one idol in the "U" temple was Sri Vedanta Desikar, and that god had only been there installed for at most thirteen years. There was then extant a decision of the Sudder Court that no new procession and no procession for any newly installed deity could be lawfully carried on in the streets, and that anyone objecting to any such procession might apply to the Court and obtain an injunction restraining it. In these circumstances, and most probably because the installation of the idol in the "U" temple had been so comparatively recent, the authorities of the "Y" temple were in 1846 objecting that all processions from the "U" temple were illegal, and their Lordships feel little doubt that the terms of the agreements between the two temples then arrived at, and with which the present suit is concerned, are to be explained and their true effect ascertained by reference to the view or belief of both parties that the law as to processions enunciated by the Sudder Court was in truth the law of the land.

Two agreements were apparently entered into in that year. One of them only, the document sued on, is extant.

The recital of the provisions of the order there made is the only source from which these provisions can now be ascertained. Whether they are completely set forth must remain in doubt.

It is convenient to transcribe in full the document in suit the more so because apparently the translation of it, with which the learned Chief Justice dealt in his judgment, is not textually the same as that with which their Lordships have been supplied.

The document, which purports to be signed by the then trustee of the "U" temple, is as follows:—

A.

26—1—1846.

The 26th day of January 1846 corresponding to 15th Thai Visvavasu. The agreement exeeuted to Nattu Mannaperumal Mudaliar Avergal, trustee of Sri Akilantakoti Brahmanda Naiker Sri Audikesavaperumal Sannadi at Tiru Mylapore by Villivalam Viraraghavachariar, trustee of the Vedanta Desikar Sannadi at Kesavaperumal Sannadi Street in the same place is as follows:—

Ever since the institution of Vedanta Desikar Sannadi in the aforesaid Kesavaperumal Sannadi Street you have been disputing the taking of the procession through the street and I have been disputing the conduct of Brahma Utsavam, the garden festival, the Kottai festival and Sri Ramaswami Utsavam of Kesavaperumal. Both of us have therefore come to a compromise between us to the effect that I should be at liberty to take the procession of the said Vedanta Desikar through the streets, just as I like on the 12 Tirunakshatram days and the 11 annual festival days including Ganthapodi festival, Vasantha festival thus in all 23 days in the year. If the garden festival or the floating festival had to be conducted on any of these 23 days I shall be at liberty to conduct such festivals in any place I like. If on any account any of the festivals is postponed I shall be at liberty to conduct such festival on any subsequent day. If during the Vasantha Utsavam and the Vidayathi Utsavam when the deity comes into the street through the temple tower gate (Gopuravasal) and goes to the adjoining mantapam, Kesavaperumal's Utsavam occurs, we may be allowed without interruption thereto, to take out whenever we require. You wrote and gave (a writing) to this effect. You will be at liberty to conduct, as you like, the festivals of the said Kesavaperumal such as the daily festivals, Panchaparva Utsavam, Ayana Utsavam (half-yearly festivals), the annual festival called the Bramha Utsavam, the garden festival, the Kottai Utsavam, Vasantha Utsavam, etc., festivals aud the monthly and the Bramha Utsavams of Sri Ramaswami Perumal and other idols, and the monthly Tirunakshatram festivals of Alwar and other Acharyas, and the annual festivals, and all the festivals of all other idols that may be instituted hereafter. If under any circumstances any of the festivals is postponed you are at liberty to conduct them on any subsequent occasion. You will be at liberty to conduct any festival of Peyalwar, Manavala Mahamuni and other idols attached to the said Kesavaperumal Sannadi. You may conduct the festivals at any time and at any place as you like. If on any of the 23 days on which festivals are to be conducted for the said Desikar in the year any of the aforesaid festivals of the said Kesavaperumal in which processions have to be taken intervenes, you will first finish the Purappadu (procession) and the Tiruvandikkappu before 10 o'clock. If on account of your indolence it it is dragged after 10 o'clock we will start our Desikar's procession. If the delay is caused by any act of providence or by rain or by any other incident we shall conduct our festival after you have finished yours.

Each of us will conduct our affairs according to the custom obtaining in each sannadi.

Neither I nor any person stepping in my place shall raise any objection to this, In this way I have executed this agreement of my own free will.

As has been already stated, the only processions which in 1846 were in use from the "U" temple were the processions of the one deity installed there. Between that time and the date of suit one further festival had been instituted —the Karthigar festival—and, it may be, other festivals also. New idols, too, had been installed in the temple.

In these circumstances, it happened that on the 13th November 1918, the trustees of all the temples in Madras were requested by Government to have prayers offered in commemoration of the Armistice. That day was not one of the 23 days mentioned in the agreement for "U" temple processions. It chanced, however, to be a day on which, at night, a very important Utsavam of the "Y" temple fell to be performed, and the defendants came under the ban of the plaintiffs for that they, deferring to the Government's request, did, between 5 and 9 p. m., with the aid of the police, and before the arranged hour for the plaintiff's procession, hold a procession of Sri Vedanta Desikar in celebration of the Armistice. As a result, but not until the 1st September 1919, this suit was instituted, and founding it upon the agreement just set forth, upon the defendants' action on the 13th November 1918, and upon the fact that new idols had been placed in their temple, the plaintiffs in effect claimed that they were by the agreement entitled to prevent the defendants from holding any processions except those of the Sri Vedanta Desikar, and these only on the 23 days in each year referred to in the agreement, and that they were entitled also to prevent the defendants from installing or retaining in their temple any other idol; and they claimed a declaration and injunction accordingly. The

Trial Judge held that the plaintiffs were not entitled to any order for the removal of the new idols which had been placed in the "U" temple, and no complaint is now made with reference to that part of his order. He held also that the plaintiffs were no longer entitled to interfere with the celebration there of the Karthigar festival any more than with those mentioned in the agreement; but, in other respects, he acceded to the plaintiffs' claim, and framed a decree on that footing. The High Court, on appeal, on construction of the agreement, held that the plaintiffs had no such right as they claimed, and dismissed the suit. Between these two views the Board has now to pronounce.

The form of the document of the 26th January 1846, supplies, their Lordships think, the key to its meaning and effect.

It is, as has been said, and as appears from its terms, one of two agreements reached at the same time. Its purpose is to set forth the liberty which as between the "U" temple and the "Y" temple the latter was to enjoy in the matter of processions and the like. That liberty, it will be noted, is very wide in its scope, extending even to "all the festivals of all other idols that may be instituted hereafter." There is no restriction as to time or place. "You may conduct the festivals at any time and at any place as you like," save on any of the 23 days of the "U" festivals, with reference to which a qualified precedence is reserved for the "U" processions. The meaning of all this, as their Lordships think, is plain. First of all, except for the supposed illegality of certain processions, the "Y" temple had always been fully entitled to carry out any of its processions without asking the "U" temple's leave. Presumably, therefore, the liberty was sought for and conceded in consequence of that supposed illegality. But, secondly, the agreement could not make legal processions which for any reason were illegal. All it could do with reference to the "Y" temple processions and ceremonies was to provide that no objection to these would be taken by the "U" temple, whatever might be at law its right to stop them. And this the agreement in effect did. Further, by implication, as their Lordships think, the agreement imported that the "U" temple would not by any procession or ceremony of its own, or in any other way, interfere with or obstruct any processions or ceremonies of the "Y" temple thereby authorized, except to the extent in terms permitted by the agreement itself.

But the agreement imposes no further fetter or restriction upon the "U" temple. If any further restriction on that temple conventionally exists, it must be found in the other agreement, the agreement by which, as recited, the "Y" temple in similar form, although in terms more restricted, had apparently defined the processions and the like which, as between the "U" temple and itself, the "U" temple might carry out. And if the law had been what it was then supposed to be, the liberty so conceded by the "Y" temple would have been, in effect, the measure of the "U" temple's enjoyment, because the agreement did not prevent the "Y" temple from exercising any right the general law gave it to stop any further processions of the "U" temple. But equally the agreement as recited imposes no restriction in terms upon the "U" temple, and, however non-existent the privilege may have been supposed to be, the agreement in no way purports to interfere with the exercise by the "U" temple of any rights in respect either of processions, ceremonies, or anything else of which by law that temple was, irrespective of any consent or approval of the "Y" temple, possessed. And the legal rights of the "U" temple in such a matter are now undoubted. The decisions of the Sudder Court above referred to are overruled. All religious processions, those of the appellant's and the respondents' temples indifferently, are now under the control of the police. As so controlled all are equally lawful. If therefore, the true effect in this matter of the two agreements be, as their Lordships think it is, that the obligation of the respondents thereunder is merely an obligation not to interfere with or obstruct any authorized procession or ceremony of the "Y" temple, it is plain that by their procession of the 13th November 1918, the respondents infringed no right of the appellant or his temple under that agreement. The result is, that the suit fails. Their Lordships, however, are not without hope that the elucidation of the effect of the instruments and the free course for the "Y" temple's processions

which, so far as the "U" temple is concerned, these secure, will, when brought to the notice of the police, enable them by apt regulation of the processions of the two temples to bring about an accommodation between them which ought to have been reached without any recourse to litigation.

Their Lordships, in expressing these views as to its meaning, have, like the High Court, assumed the agreement in suit to be valid. They have not inquired into and do not pronounce upon the defences to the suit made in their written statement by the respondents.

For the reasons they have given, their Lordships think that the order and decree of the High Court should stand, and they will humbly advise His Majesty that this appeal therefrom be dismissed with costs.

Appeal dismissed.

Solicitors for Appellant—*T. L. Wilson & Co.*

Solicitor for Respondent — *Douglas Grant.*

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* * A. I. R. 1926 Privy Council 68

From Allahabad

15th April 1926

VISCOUNT DUNEDIN, LORD BLANESBURGH, SIR JOHN EDGE AND MR. AMEER ALI.

Ram Charan Lonia and *others*—Appellants.

v.

Bhagwan Das Maheshri, since deceased and *others*—Respondents.

Privy Council Appeal No. 177 of 1924 ; Allahabad Appeal No. 6 of 1922.

* * *Hindu Law—Alienation by father—Contract to sell family property to pay off prior mortgage, in effect reducing its value to nullity is beyond his powers and should be set aside.*

The father and manager of a joint Hindu family contracted to sell the family property to A for payment of a prior mortgage on the property but before the contract was completed into sale, he contracted to sell it to B. The contract with A remained in force for about three years and it subsequently fell through and the deposit received thereunder was returned to A. Immediately afterwards B sued for specific performance against manager alone and got a decree. Thereafter the sons, some of whom were adult at the date of the contract, sued to set aside the sale.

Held : that so long as earlier contract with A was in existence B was under no enforceable obligation to perform his own ; and immediate payment of the purchase price being the prime necessity in view of the earlier mortgage to be paid off, the contract bound the vendor to sell, at a fixed price, property of apparently increasing value in circumstances which gave the purchasers the privilege of indefinitely postponing completion of the purchase and payment of the price, with the further privilege, if it so suited them, of repudiating the bargain altogether on the ground that so long as the earlier contract was insisted upon by its purchaser, the vendor could make no title. Such a transaction was entirely beyond the power of the father as karta of the joint family, and was not binding on the plaintiffs. [P 70 C 1 P 72 C 1]

L. DeGruyther, B. Dube and *Fateh Singh*—for Appellants.

T. B. W. Ramsay—for Respondents.

Lord Blanesburgh.—The broad issue in this suit is whether a sale of ancestral zamindari property agreed to be made to the appellant, Ram Charan Lonia, and another, now deceased, by the nominal respondent Gopal Das, the head of a joint Hindu family to which the property belonged, is binding upon the major and minor sons of Gopal Das. If it is, no further difficulty arises. If it is not, then the order proper now to be made may, in the somewhat unusual circumstances of the case, raise supplemental questions of nicety.

Gopal Das is a Vaishya or trader by caste. His family, at the institution of the suit, consisted of seven sons : one is now dead. Four of the sons were, on the 3rd September 1912, the date of the impeached agreement, adult. The other three were then, and at the commencement of the suit, still infants. The joint family property included a business at Benares for the sale, at first of grain and later of cloth. From before 1912 the four adult sons had been helping their father in the conduct of that business and in the management of the zamindari. But Gopal Das himself remained throughout the karta of the joint family.

The property in suit consists of three villages in the district of Jaunpur. It represents substantially the entire immovable heritage of the family. It became part of their possessions when in 1896 it was taken over by Gopal Das in satisfaction of a debt of Rs. 15,000 then owing on business transactions by another firm of traders. No reliable valuation of the property at the different

relevant dates is to be found in the evidence. It is estimated, however, by the appellants in their written statement to have been at the date of the agreement in suit of the value of between Rs. 21,000 and Rs. 22,000. By the sons it is alleged to have been worth then, and to be worth now, a great deal more. For the purposes of this judgment their Lordships, while by no means convinced of its correctness, wiil accept the appellants' estimate of its value at the contract date. It improved in value immediately afterwards.

The family business was not apparently successful, and the position became embarrassing. In 1909 money had necessarily to be raised and, in circumstances which admittedly called for the advance—although whether on the terms on which it was obtained is another matter—the property was, on the 10th July 1909, mortgaged to one Manik Chand to secure a sum of Rs. 10,500. This mortgage was executed by the four adult sons of Gopal Das and by himself, both on his own account and as guardian of his three infant sons. Compound interest at 8¼ per cent. per annum with half-yearly rests was reserved by the mortgage, and there was a penalty clause under which the interest could be increased to 9 per cent. per annum similarly compoundable. This possibly somewhat high rate, even apart from the penalty added, has attracted the notice of the High Court of Allahabad in the judgment under appeal, and to that aspect of the transaction their Lordships will again advert. For the moment they allude to it only to draw attention to the critical position of the family's free interest in the property should there be any persistent neglect on their part to keep down the interest as it accrued under the deed.

And between the date of the mortgage and July 1912, practically no interest was paid—not more than Rs. 800, possibly not so much. In consequence, by that date the amount due in respect of principal and capitalized interest in arrear amounted to nearly Rs. 14,000. Manik Chand had not so far begun to press for payment either of principal or interest, but the amount charged upon the property was automatically increasing at a great rate. No funds were available to stay the no longer remote possibility of all value in the equity of redemption being extinguished; money also was needed for payment of other trade debts that had accrued, as well as for the development of the family cloth business then recently initiated. In these circumstances a transaction even involving the disposal by Gopal Das of this entire immovable family property might well be justifiable and be binding on the whole family, provided the property was not sacrificed for an inadequate price and provided the consideration was calculated to relieve the necessity, the existence of which called for the disposition. In the present case, for instance, a very short limit of time within which the purchasers must complete or lose their contract was plainly of the essence of any transaction of sale called for by the circumstances as they then existed.

The first transaction in relation to this property which in 1912 was entered into by Gopal Das was a contract of the 16th July, whereby he agreed to sell to one Mt. Muhammed-un-nisa 16 annas of one of the three mortgaged villages—Duhawar by name. The price was the sum of money which, invested at 4 & 7/8 per cent., would produce the then net annual rental of the property. The sale was to be completed in a month, and Rs. 502 were paid to Gopal Das by way of deposit. This contract remained operative until July 1915—three years later—when, but not till then, as a result of Gopal Das's default, it was brought to an end by an order made at the instance of the purchaser for return of her deposit and interest.

The second transaction was the contract in suit. Under it Gopal Das, in effect, agreed to sell to the purchasers, now represented by the appellants, the entire mortgaged property at a price corresponding to the sum which, invested at 4 & 1/2 per cent. per annum, would produce an amount equal to the then net rentals of the property. The purchasers were to retain so much of the purchase price as was necessary to enable them to discharge all sums owing on the mortgage of the 10th July, 1909, and were to account to the vendor for the balance of the purchase price. The sale deed was to be executed in 30 days, and a currency note of Rs. 500 was paid to Gopal Das as earnest money. Such in its stated effect is the contract which six of the seven

sons of Gopal Das sought in this suit to set aside.

On their face these terms seem prudent enough. The price, found by subsequent calculation to be Rs. 22,508-10-10, not only represented an adequate number of years' purchase of the then rental, but under the terms of the contract was payable in 30 days. If so paid, after discharging in full the amount at that date due on the mortgage of 1909, a substantial sum would have remained to meet the other family necessities, thus justifying the propriety of the disposition.

But the terms of the contract as so stated do not describe its real result. They take no account of the influence upon the transaction of Muhammed-un nisa's earlier contract, the existence of which was well-known to the purchasers before they entered into their own agreement to purchase. From this it followed, as will appear in the sequel, that, so long as that earlier contract remained in being, the purchasers were under no enforceable obligation to perform their own. Nor were they liable to be visited with the usual consequences of such laches if, during the same period, they omitted to take any steps to enforce its performance by the vendor. The real question in the suit, therefore, as their Lordships see it, is whether a contract of sale involving such potentialities, all in the event realized, can be held binding on the plaintiffs.

Gopal Das apparently soon repented of both contracts and would perform neither. The first purchaser, after, as has been seen, standing by her contract for nearly three years, at length sued for and recovered her deposit. Immediately afterwards, —namely, on the 31st August 1915, the purchasers under the contract in suit commenced against Gopal Das alone an action for its specific performance. That suit was resisted by Gopal Das, and, amongst other defences, he contended that it was at that date barred by laches. But the plea was repelled by the Subordinate Judge on the ground as already indicated, that so long as Mt. Muhammed-un-nisa's contract remained subsisting the plaintiffs to that suit

Did not dare enforcement of their contract But the removal of that obstacle cleared their way to Court. In other words, the plaintiffs are not guilty of any laches.

And this was on appeal the view of the High Court also.

In the result, specific performance of the contract against Gopal Das was decreed by the Subordinate Judge of Jaunpur on the 10th February 1917, and his decree was affirmed by the High Court at Allahabad by decree of the 6th March 1919. Pending the appeal, namely, on the 12th May 1917, an order for possession of the property was made by the Subordinate Judge, and on the 1st November, 1917, under order of the Court, a formal sale deed of the property was executed by the Judge in the name and on behalf of Gopal Das in favour of the purchasers, and since that date or shortly afterwards they have been in actual possession of the property and in receipt of the rents and profits. It is stated in the sale deed that the amount due on the mortgage of the 10th July, 1909, was, on the 1st November, 1917, Rs. 21.818-14, and that after setting aside that sum out of the purchase price of Rs. 22,508-10-10, and deducting also therefrom the Rs. 500 paid to Gopal Das as earnest money, the sum of Rs. 189-12-10 alone remained for payment to him. The purchasers. however, did not then pay off the mortgage of the 10th July, 1909. They made no payment at all on this account until 4th September 1919, wnen they deposited in Court a sum ultimately increased to Rs. 23,200, sufficient to satisfy the debt. Manik Chand, as appears in the judgment of the High Court, has now been paid off by the appellants.

In the specific performance suit a direction was given on the 17th July 1916, by the Subordinate Judge that, as the property, in question was family property, the sons of Gopal Das should be added as defendants. The plaintiffs however, elected to continue their proceedings against Gopal Das alone. In consequence the High Court while affirming the decree for specific performance against him as above mentioned, refused to express any opinion as to its value in the circumstances. In their judgment it had none so far as the present plaintiffs are concerned.

On the 7th September 1916 this suit was instituted. The plaintiffs were all the sons of Gopal Das, with the exception of one son, Debi Das, who along with Gopal Das, was made a

pro forma defendant. The defendant, Sital Das, one of the purchasers, died during the pendency of the suit, and eleven of the appellants were substituted as his representatives. The plaintiffs, alleging that the property in suit of the value of Rs. 40,000 was joint family property, asked for a decree that the agreement to sell it to the defendants, the purchasers, was invalid. It is to be noted at this point that no suggestion was made in their plaint by the plaintiffs that the mortgage of the 10th July 1909, was in any way open to objection or not binding upon them.

On the 29th March 1919, the Additional Subordinate Judge of Jaunpur dismissed the suit with costs. He held that necessity existed and that the contract to sell was binding on the plaintiffs upon the obligations of the purchasers under the contract in suit. He in no way, however, adverted in his judgment to the influence of the earlier contract of the 16th July 1912. In supporting that contract as he did, he treated it as effective and enforceable according to its tenor.

The plaintiffs appealed to the High Court at Allahabad, and that Court, on the 31st January 1922, allowed the appeal, decreed the suit, and set aside the decree of the Court below. The learned Judges there were not influenced to their conclusion any more than the learned Subordinate Judge had been, by the effect of the contract with Muhammed-un-nisa upon the obligations of the purchasers under the contract in suit. They agreed, too, with the learned Subordinate Judge in the view that the family circumstances called for definite action in July 1912; but as a sum of Rs. 14,000 would then have sufficed to pay off Manik Chand, there was, in their judgment, no necessity for Gopal Das to part with property of himself and his sons for Rs. 22,000. Moreover, and this was the principal ground of their judgment, they held that while as to the principal sum of Rs. 10,500 secured by the mortgage to Manik Chand there was legal necessity sufficient to make that transaction binding, not only upon Gopal Das and his major sons, but also upon his minor sons, there was no legal necessity to submit to so high a rate of interest as the rate reserved. In their judgment the sum chargeable against the family property under that mortgage should be limited to Rs. 10,500, with simple interest at the rate of 8¼ per cent. per annum from the date of the mortgage, the 10th July 1909, to the date of the sale deed, the 1st November 1917, but no longer. Their decree, therefore, in effect, was that the plaintiffs were not bound by the agreement in suit nor by the sale deed of 1st November 1917; that the property must be reconveyed on payment to the present appellants of Rs. 10,500, with interest at the rate aforesaid to the 1st November 1917 only; and that the appellants were to account to the present respondents for the profits of the property from the date of their taking possession thereof until reconveyance. From that order the purchasers appeal.

Their Lordships are of opinion that the contract in suit is not binding upon the sons of Gopal Das, so that they are in agreement with the High Court in its main conclusion, and see no reason for restoring the judgment of the learned Subordinate Judge. They are, however, unable to reach that conclusion on the same grounds as the High Court. They think also that in matters of detail the order of that Court requires amendment. They do not, for instance, see why, if the appellants are made accountable for the rents of the property during their period of possession, they should be deprived of any interest on the mortgage during the same period; why they should be placed in a worse position than Manik Chand would have occupied, in whose shoes in this respect they stand.

But their Lordships go further. The mortgage of the 10th July 1909 was in no way impeached or questioned in the suit by the plaintiffs, and its terms in the view of the Board are not such as to justify a Court in judicially affirming, without evidence to that effect, that in substance they are either excessive or unconscionable. In these proceedings accordingly a Court must, their Lordships think, act upon the view that at the date of the contract in suit the mortgage of the 10th July 1909 was valid, and that the question whether the contract was binding upon the family must be determined on that footing.

Dealing with the case on that basis, their Lordships are of opinion that that contract was not so binding for a reason which they have already indicated. In

truth the contract was of the most improvident description. Immediate payment of the purchase price being the prime necessity the contract bound the vendor to sell at a fixed price property of apparently increasing value in circumstances which gave the purchasers the privilege of indefinitely postponing completion of the purchase and payment of the price, with the further privilege, if it so suited them, of repudiating the bargain altogether on the ground that, so long as the earlier contract was insisted upon by its purchaser, the vendor could make no title. In other words, the existence of this earlier contract in the event showed that the contract in suit was deprived of all value as a solvent of the family's financial difficulties at its date, and was converted into an arrangement not materially more beneficial than one by which Gopal Das, at the end of three years, became bound to hand over to the mortgagees for, in effect nothing, the entire equity of redemption in the mortgaged property. In their Lordships' judgment such a transaction was entirely beyond the power of Gopal Das as karta of the joint family, and is not binding on the plaintiffs. To this extent, therefore, although on these grounds only, the order of the High Court should, their Lordships think, be affirmed.

The consequential directions proper to be made are, however, not so clear. The position is much complicated by the fact that the appellants have without real title been in possession and receipt of the profits of the property for many years. Their claims, as, in effect, transferees of Manik Chand's mortgage have also to be borne in mind.

In strictness, possibly, their obligations as purchasers under an invalid contract should be alone dealt with in this suit, and their rights as mortgagees, whatever they are, be reserved for determination in another proceeding. But their Lordships agree entirely with Walsh, J., when, in his judgment in the High Court, he expressed the view that this was pre-eminently a case in which the Court being seised of the whole matter, should make such an order as may terminate the controversy and do justice between the parties.

Accordingly, while their Lordships are of opinion that the contract of the 3rd September 1912, was not binding upon the plaintiffs, they think that in the circumstances it should now be set aside only upon terms. One of these terms must, they think, be that the appellants have the full benefit of the mortgage of the 10th July 1909 as a mortgage carrying compound interest at the rate of 8¼ per cent. per annum, and that their possession of the property, although unwarranted as purchasers, should not—it having been taken under an order of the Court—be treated as that of a mortgagee in possession with all the burdens of such a possession. It is just, as their Lordships think, that the mortgage should for this purpose be treated as a usufructuary mortgage—and the possession of the appellants be treated as possession thereunder—with the result that during that possession they will be entitled to no interest, but on the other hand will not be accountable for profits. It will be just also that the plaintiffs should have the costs in both Courts in India, if, ultimately, they redeem the property as below stated, but not otherwise.

With these views in mind their Lordships think that the proper order now to be made is the following:

Vary the order of the High Court by directing that an acconnt be taken of the amount due on the 1st November, 1917, in respect of the mortgage of the 10th July 1909 as a mortgage carrying compound interest at the rate of 8¼ per cent. per annum. Let that mortgage stand between the appellants and respondents as security for the sum so fonnd less the costs of the plaintiffs in both Courts in India, All interest to cease as from the 1st November 1917, but the appellants not to be accountable for rents and profits of the property during their period of possession. On payment by the respondents within one year from the date of certificate of the sum so certified less the costs aforesaid, let the appellants reconvey the property comprised in the deed of sale of the 1st November 1917 freed and discharged from all claims and demands in respect of the mortgage of the 10th July 1909. In default of such payment on or before the date aforesaid let this suit as from that date stand dismissed without costs.

Each of the parties should in any event bear their costs of this appeal.

Decree varied.

** A. I. R, 1926 Privy Council 73

(*From Bombay*: 1923 *A. I. R. Bom.* 130)

29th April 1926

LORDS BLANESBURG AND DARLING, SIR JOHN EDGE, MR. AMEER ALI AND LORD SALVESEN.

(*Bai*) *Nagubai Manglorkar*—Appellant.

v.

Bai Monghibai (since deceased) and *others*—Respondents.

Privy Council Appeal No. 156 of 1924.

** *Hindu Law — Maintenance — Permanent concubine is entitled—Her residing in family house is not necessary.*

Provided the concubinage be permanent (awarudha stri until the death of the paramour, and sexual fidelity to him be preserved, the right to maintenance is established, although the concubine be not kept in the family house of the deceased. 26 *Bom.* 163, *Appr.* [P 76 C 2]

E. B. Raikes—for Appellant.

L. De Gruyther, G. Lowndes and *J. M. Parekh*—for Respondent.

Lord Darling.—This is an appeal in forma pauperis by special leave from a decree of the High Court dated the 11th August 1922, (reported in *A. I. R.* 1923 *Bom.* 130—Ed.) which reversed a decree of that Court in its original jurisdiction dated the 25th November 1921.

The question in the appeal is whether the appellant is entitled to maintenance from the estate of one Vasanji Madhavji Thaker, deceased.

The appellant is a member of the Gurav caste of Hindus, and at the age of twelve years was given into the keeping of a Shethia, or rich Hindu, named Gopal Mulji and lived with him for twelve years and bore him two children and during that time made the acquaintance of the deceased, who was a friend of his and used to accompany him occasionally when he visited her.

The deceased was a very wealthy Hindu of the Lohana caste, who was married but on bad terms with his wife (with whom he did not cohabit) and her two sons, whom by his Will he afterwards practically disinherited. He was from Guzerath and lived in Bombay, and was therefore governed by the Mayukha.

The appellant, when of the age of about twenty-six, had to leave Gopai Mulji because of ill-treatment by him.

The deceased then took her under his protection and she lived with him on terms of affection on either side for at least five years before his death, bore him a daughter, was faithful to him during his life and has been faithful to his memory since his death. Such was the esteem of the deceased for the appellant that he would have married her had not their difference of caste made it impossible.

After his death she applied to his executors for maintenance and to his widow and issue to admit her claim thereto, and on their failure to comply with her request she instituted the present suit claiming maintenance as a Hindu concubine of the deceased in his sole keeping till his death. The respondents put in written statements in which they alleged that the appellant was a prostitute and was not faithful to the deceased during his life and had not led a chaste life since his death, but they did not deny that the facts alleged by her, if proved, would entitle her to maintenance.

The following are the issues raised by counsel for the respondents with the findings of each Court thereon :—

(1) Whether the plaintiff (appellant) was in the sole keeping of the deceased before his death.

Both Courts : Yes.

(2) Whether the deceased paid to the plaintiff a fixed monthly allowance of Rs. 400 per month prior to his death.

1st Court : Payments made averaging Rs. 400 per month.

2nd Court : Payments were made : exact amount not material.

(3) Whether the plaintiff has continued to be chaste after the death of the deceased.

Both Courts : Yes.

(4) Whether the plaintiff is entitled to any and what maintenance

1st Court : Yes ; reference as to amount.

2nd Court: No.

At the trial it was proved that the deceased for the last five or six years of his life, if not for longer, had left his family house in the occupation of his wife and her children and was residing almost, if not entirely, with the appellant in a house rented in her name, that he had engaged a governess to teach her and her daughter, that he kept a motor-car for his and her use, and that he took her up country with him and told his friends to call on him at the house where she lived, that his sons visited him there and that he was nursed there during his last illness and only removed shortly before his death.

The trial Judge in his judgment defined the legal position to be that, where a Hindu woman has been kept by a Hindu till his death as his permanent concubine—as he found was the fact in regard to the appellant—his estate is liable for her maintenance in the hands of those who take it, even though the connexion with her was an adulterous one, but that her right to maintenance is conditional upon her chastity.

He stated that the appellant gave her evidence in a very straightforword manner and that he believed her, that he thought all the evidence given on her behalf truthful, and he disbelieved the evidence on the other side.

He held that it was established that Vasanji did not care for his family, nor they for him, and that he looked to the appellant as the person who was a member of his family and looked to her for nursing. He passed a decree in appellant's favour for maintenance and directed a reference to ascertain its amount.

The Respondents 3, 4 and 5 appealed, but did not in their grounds of appeal suggest that, if the trial Judge's findings of fact were correct, tho appellant was not entitled to maintenance.

At the hearing of the appeal the appellate Court adopted a new contention put forward on behalf of the respondents 3—5 by a counsel who had not appeared for them at the trial. That contention was that the Hindu concubine of a Hindu, though faithful to him till his death, was net entitled to maintenance from his estate unless she was avaruddha. The appellate Court held that this term is in law applicable only to a woman openly kept by a Hindu in his own family and as a member of his family. They found on the evidence that the plaintiff was in the exclusive keeping of the deceased during the last four or five years immediately before his death in the sense that she consorted with him alone during that time, but that the deceased did not make the plaintiff's house his residence, that the connexion between the deceased and the plaintiff was not perfectly open and recognised, and was nothing more than that which a man might have with a woman who was his kept mistress living outside his house and unknown to his family. They also found that the plaintiff was not openly kept by the deceased in his own family and as a member of the family," that she was not his "dependent" and was not known as such to all concerned ; and that she had not accepted practically the obligation of a family life, but was merely a kept mistress of the deceased. The learned Judges stated that the question whether a mistress of a Hindu in the position of the plaintiff was entitled to maintenance had not been previously decided by the High Court. They held that only a woman who was in the position of an avaruddha stri to the deceased was entitled to any maintenance against his estate in the hands of his heirs, that the expression avaruddha stri meant at the present time a woman who openly lived as a wife, though not legally married, and as a member of the family in the house of the man, and was recognised by all concerned as is permanent concubine.

Having come to this conclusion, they scrutinised the evidence (which was given when no such questions had been raised) to find out whether the appellant had been so kept. As to the effect of this evidence Shah, Ag C. J, differed in certain points from the trial Judge ; but Crump, J., accepted his findings, yet found that even on them the appellant was not entitled to maintenance. The High Court on appeal accordingly dismissed her suit.

From their decree dated the 11th August, 1922, the appellant, after obtaining a certificate under Ss. 109 and 110 of the Civil Procedure Code, obtained on the 28th November, 1922, special leave to appeal in forma pauperis, and she submits that her appeal should be allowed

and the decree of the trial Judge restored.

The question now to be decided upon this evidence is whether the appellant is entitled to maintenance out of the estate of the deceased and this, as appears from the judgments delivered in the Court of Appeal, depends upon whether, upon the facts proved, she was in strict sense, according to the Hindu law, as prevailing in Bombay. the "permanent concubine" of deceased. This word concubine has long had a definite meaning, whether expressed in the language of India or of Europe. The persons denoted by it had, and have still where it remains applicable, a recognised status below that of wife and above that of harlot. In the Glossary of Ducange, under the title *Concubina*, we read that *Pellex honestior est quam Amica, ut quae accidat proprius ad uxoris naturam:* and this, it would seem, is because *uxor nomen est dignitatis non voluptatis.* Almost a wife, according to ancient authorities, the distinction of the concubine from harlots was due to a modified chastity, in that she was affected to one man only, although in an irregular union merely. So Bracton is quoted by Ducange as writing, *Eadem etiam concubina legitima diciturad discrimen ejus quae quaestum facit.* Harlots solicited to immorality : concubines were reserved by one man.

The law, which must decide this case, originated in the sayings of almost immemorial sages, but has long been condensed into such treatises as the Mitakshara and the Mayuka. The relevant passages from the Mitakshara are, in the judgment of the Court of Appeal, thus quoted from Stokes' Hindu Law :—

"Heirless property goes to the king, deducting however, a subsistence for the females as well as the funeral charges . . . the expression 'deducting, however, a subsistence for the females as well as the funeral charges' is explained as excluding or setting apart a sufficiency for the food and raiment of the woman, and as much as may be requisite for the funeral repasts and other obsequies in honour of the late owner, the residue goes to the king. . . ,"

This relates to women kept in concubinage ; for the term employed is 'females' (yoshid). The text of 'Narada' likewise relates to concubines ; since the word there used is 'woman' (stri). . . But a king who is attentive to obligations of duty should give a maintenance to the women of such persons." The words used for women kept in concubinage" and "concubines" in the original are "evarudhha stri." "Vijnano swara' there clearly explains the meaning of the word "str in "Narada's" text, and the word "yoshid' used in Katyayana's text as including "avaruddha' stri." The text of "Narada' in para. 7 of the same section of the "Mitakshara" runs as follows: —"Thus Narada has stated the succession of brothers, though a wife be living : and has directed the assignment of a maintenance only to widows. Among brothers, if any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth, except the wife's separate property. Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord.

The women or female slaves, being unequal (in number, to the shares), must not be divided by the value, but should be employed in labour (for the co-heirs) alternately. But women (adultresses or others) kept in concubinage by the father must not be shared by the sons, though equal in number for the text of Gautama forbids it.

The appeal Court decided, and their Lordships agree with them, that the right to maintenance, such as is here claimed, is limited to those women who amongst Hindus are properly called avaruddha ; a word ordinarily and accurately rendered by " concubine " in English. Avaruddha has been defined by various writers, and the appeal Court approved of this definition, taken from page 406 of Gharpure's Translation of the Vyavahara Adhyaya of the Mitakshara :

"Avarudddha" stri means women who are the protected slaves of another,

and Shah, Ag. C, J., quotes with approval these words from the commentary on the word "avaruddha."

These very women are prohibited by the master from intercourse with other men, with an injunction to stay at home, with the object of avoiding any lapse of service. These are known as avaruddha or protected slaves.

As Shah Ag.C.J., points out in his judgment, the Mayukha is on this point in agreement with the Mitakshara ; and he quotes from Mandlik's Hindu Law, p. 70, this passage :

Striah are female slaves. When uneven in number, they are to be made to work by turns as may be found workable ; when even in number, they are to be divided. The kept mistresses of the father, however, though even in number, should not be divided, as directed by the following text of Gautama : There is no division of women appointed by the father for enjoyment.'

These latter words are evidently a recognition of the manifest impropriety of allotting to sons the concubines of their father ; women who might very well be mothers of the half-brothers of these same sons.

In the judgment of the appeal Court it is essential that to be avaruddha stri, or concubine, entitled to maintenance,

the woman must be, in the words of Shah, Ag. C, J.,

> a continuously kept concubine, a woman in open residence and avowed connexion with the man.

That originally such women were slaves, and necessarily resident in the house as members of the family, is certain. But slavery no longer exists in India, so it is now contended that the avaruddha stri, though free women, must yet be suject to such restraint as is involved in living as a member of the family which in this case would mean living in the same house with the wife and children of the deceased man. It is unnecessary to hold here that "avaruddha" does now, as Mr. Raikes suggested, mean no more than kept and reserved for the sexual enjoyment of one man, to whom the mistress remains faithful ; for all the facts of this case, even as accepted by the Court of appeal, go far beyond any such mere reservation. In the Court of appeal, Shah, Ag. C. J., used these words :

> Taking a broad view of the case, I am satisfied that plaintiff was in the exclusive keeping of the deceased Vasanji, during the last four or five years prior to his death, in the sense that she consorted with him alone during that time. But that connexion is not, in my opinion, sufficient to bring the case within the scope of the rule which entitles a continuously kept concubine to maintenance. I may mention that the English expression 'continuously kept concubine' is the nearest approach to the meaning of 'avaruddha stri.' It connotes an open residence and avowed connexion with the man, both of which I think can be fairly said to be absent in the present case. I do not desire to lay down any hard and fast rule as to what mode of life and charact of the connexion between the kept woman and her paramour would be sufficient to constitute her an 'avaruddha stri' ; that must depend upon the facts and circumstances of each case and must be decided as a question of fact on the evidence.

Crump, J.'s judgment is to the like effect. Both Judges lay much stress on the fact that the appellant was not kept in the house of the deceased's family, but in a separate house, as was the fact.

Kanga J., the trial Judge, however, thus deals with that matter and the events of deceased's last illness :

> The natural inference from this is that the deceased did not care for the members of his family, and the members of his family did not care for him, and the deceased looked to the plaintiff as the person who was a member of his family, and looked to her for nursing him.

Their Lordships agree with the trial Judge in this view of the matter. And so the real question would appear to be whether to be of the family the concubine, otherwise entitled to maintenance, must reside in the same house with the deceased, together with his wife and the regular members of his family. Their Lordships are of opinion that such common residence is now unnecessary, whatever may have been the case when the concubine was a slave of the household. The emancipation may have been gradual, as several decided cases would indicate, but the case of *Ningareddi* v. *Lakshmawa* (1), a case in the appellate Court, decided in 1901, appears sufficient to establish the present position. As the head-note expressses it :

> Under Hindu law a concubine gets no right of maintenance against her paramour unless, having been kept continuously till his death, it can be said that the connexion had become permanent.

The facts of that case, so far as they are relevant to this one, were that one Govindraddi had a wife Venkawa, who, owing to ill-health, left him about the year 1877 and went to reside with her parents. Govindraddi then took Lakshmawa to his house and she lived with him as his mistress. In 1890, Venkawa, having regained her health, rejoined her husband ; but Govindraddi continued to visit his mistress Lakshmawa till his death in 1897. The Court decreed maintenance to Lakshmawa, the concubine. In this case the man and the woman were Hindus and the paramour was governed by the law of the Mayukha, and in their Lordships' opinion the decision above mentioned is sufficient authority for holding that providing the concubinage be permanent, until the death of the paramour, and sexual fidelity to him be preserved, the right to maintenance is established ; although the concubine be not kept in the family house of the deceased. This incident of residence in the family house was not the essential reason for the right to have maintenance from the goods of the deceased paramour, but rather a means of ensuring the qualified chastity of the mistress.

As the claim of the appellant here had been, before the trial Judge, resisted mainly on the ground that she had not remained chaste and faithful to the deceased, and not definitely on the ground that she was never in the position of avaruddha stri (permanent concubine) towards him, their Lordships are of opinion that the view most favourable to

(1) [1901] 26 Bom. 163=3 Bom. L. R. 647.

her should be taken in considering the evidence going to prove her exact position or status resulting from her connexion with the deceased. For, had she been duly warned, the appellant might well have brought more evidence to fortify that contention and going to prove her precise situation. To their Lordships, however, it appears that the facts proved or admitted are certainly strong enough to bring this case within the rule entitling the appellant to maintenance out of the property of the deceased, since the findings in her favour go beyond those held sufficient, in the case of *Ningareddi* v. *Lakshmawa* (1) by the Court of appeal in Bombay, a decision whose authority has not been questioned.

Their Lordships will humbly advise His Majesty that the decree of the High Court, dated the 11th August 1922, should be set aside, except as to the costs of Bai Monghibai, Charandas Vasonji Thakkar, Ranchhoddas Vasonji Thakkar (minors) and Pragji Dayal Hariani (the order as to which is to stand), and that the decree of the High Court in its Original Civil Jurisdiction, dated the 25th November, 1921, should be restored. The appellant must have her costs of the appeal to the High Court, and such costs of this appeal as she may be entitled to as an appellant in forma pauperis, and the Respondents Nos. 1, 4, 5 and 6 will also have their costs of this appeal, all such costs to be paid out of the estate.

Appeal allowed.

Solicitors for Appellant—*Lattey and Hart.*

Solicitors for Respondent—*T. L. Wilson and Co.*

A. I. R. 1926 Privy Council 77

(*From Rangoon : vide A. I. R.* 1925 *Rang.* 254.)

16th April 1926

THE LORD CHANCELLOR, LORDS ATKINSON AND DARLING AND SIR JOHN EDGE.

(*Maung*) *Po Kin* and *another*—Appellants.

v.

Maung Po Shein—Respondent.

Privy Council Appeal No. 165 of 1924.

Benami—Burden of proof is on person alleging ownership.

In all benamidar transactions the very object of the parties is secrecy ; but still the person who alleges that property conveyed on another belongs to himself must prove his allegation and prove it beyond reasonable doubt. [P. 78, C. 1]

G. Lawrence and *R. W. Leach*—for Appellants.

A. M. Dunne and *G. S. Sanders*—for Respondent.

The Lord Chancellor.—This is an appeal from the decree of the High Court of Judicature at Rangoon, reversing the decision of the District Judge of Myaungmya.

A man named Ko Lu Gale died on the 14th October 1913. There were then standing in his name a number of conveyances of paddy lands and also a number of mortgages of considerable value. The principal appellant, who was his brother, alleges that he was beneficially entitled to the lands comprised in the conveyances and to the mortgages and that the deceased was a benamidar for him. The burden of establishing that claim was, of course, upon the appellant, and the question in the case is whether he has discharged that burden. The trial Judge said that he had, but the High Court came to the opposite conclusion. The appellant appeals, and it is for him to satisfy the Board that the judgment of the High Court was wrong.

The facts have been brought before their Lordships in a very able and careful argument by Mr. Lawrence. No doubt there are circumstances which tell in favour of the appellant. First, it was he who actually paid the purchase moneys for the lands and the sums advanced on mortgage or the greater part of them, although it is not shown where he obtained those moneys. Secondly, when the matter came to be litigated, he held the title-deeds ; and, although the High Court seems to have thought that he came by the title-deeds dishonestly, and in short that he stole them after the death of his brother, there is, in their Lordships' opinion, no evidence to support such a conclusion. If the property was not held by his brother in trust for him, he probably held the deeds, not because he stole them, but because he had the custody of them for his brother. Thirdly, the appellant let some of the property

(according to the evidence) and received some of the rents; but the receipts for those rents are not produced, and it does not appear whether he received them as being his own or as agent for his deceased brother. All these facts are circumstances which are very justly adduced in favour of the appellant's claim.

But on the other side there are also some most important facts. To begin with, and this no doubt is the most important of all, all this property stood in the name of the deceased; and on some of the documents it is stated that the deceased (apparently the deceased in person) paid the money. Of course the burden is on the appellant to displace the natural inference to be drawn from that fact. The burden is no doubt a difficult one to discharge, because in all these benamidar transactions the very object of the parties is secrecy; but still the person who alleges that property conveyed to another belongs to him must prove his allegation and prove it beyond reasonable doubt. In the next place, it is to be noted that the appellant, the first defendant in the case, did not on the death of his brother tell his brother's heirs, that is to say his brother's widow and son and daughter, that there was property standing in the name of the deceased which he, the appellant, claimed to be his. In fact, it is plain from the appellant's own statement, that he concealed from the heirs the existence of this property and these mortgages. That is a very suspicious circumstance indeed. Then there is this: that about a year after the death Ko Lu Gale the appellant, the first-named defendant in the action, procured the daughter of his deceased brother, then a girl of sixteen years of age and living in the appellant's house, to give her formal consent to a mutation of names under which the greater part of these properties were transferred to the appellant's sister and, as the appellant says, in trust for him. One would have thought that an honest man seeking to bring about such a transfer would call, not upon the minor daughter of the deceased, the youngest of all the heirs, but upon all the heirs including the deceased's son and his widow, to join in effecting this mutation of names, and, if they refused and if the claim was a proper one, would have taken proceedings to enforce it. Nothing of the kind was done, and the mutation was effected secretly through the agency of this minor daughter. That again is a most suspicious circumstance.

At a later date, the appellant applied for a succession certificate to the estate of the deceased in order that he might transfer into his own name, or that of his nominee, two mortgages which up to that time had not been transferred. On that application the heirs were cited. They inquired as to what was meant, and, having been told that the appellant claimed that the deceased held these mortgages for him, they immediately made further inquiries and then for the first time learnt of the existence of the conveyances and mortgages and what had been done with them; and ultimately they brought this suit to compel the defendant and his sister to re-transfer the property and to account for the proceeds.

There is this further fact. The widow of the deceased swore that after her marriage to him, that is to say about six months before his death, she and her husband went to the appellant's house and took with them two cash bags, containing about Rs. 3,000, for investment. That evidence was not shaken on cross-examination, and it supports the view that the deceased was entrusting money to his brother for investment in his own name.

It is also to be observed that the deceased had jewellery to the value of about Rs. 10,000, in addition to other jewellery of about the like value which had been lost or made away with by a former wife, whom he had divorced; and it is unlikely that a man, possessed of jewellery to that value, should have such small resources as have been disclosed, apart from those which are in issue in this suit. It is unnecessary to refer at length to the history of the jewellery in question, although a good deal has been said about it; but the facts are so confused that it would be dangerous to draw any definite conclusion from that part of the evidence. Nor would it be useful to examine whether the deceased had sufficient means to enable him to make these investments, or whether, on the other hand, the appellant had sufficient means for that purpose. The evidence under that head is so slight that it is undesirable to build any conclusion upon it.

Upon the whole, while the case no doubt admits of serious argument, such as has been addressed to the Board, the appellant has not satisfied their Lordships that the decision of the High Court, which was expressed in a detailed and careful judgment, was wrong. Accordingly their Lordships have come to the conclusion that this appeal must fail, and they will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for Appellants—*Hentry Hilbery & Son.*

Solicitors for Respondent—*Bramall & Bramall.*

A. I. R. 1926 Privy Council 79

(*From Patna*)

29th April 1926

VISCOUNT DUNEDIN, LORD BLANESBURG AND SIR JOHN EDGE.

Bindeshwari Prasad Singh—Appellant.

v.

Maharaja Kesho Prasad Singh Bahadur—Respondent.

Privy Council Appeal No. 35 of 1924; Patna Appeal No. 5 of 1923.

(*a*) *Bengal Tenancy Act*, (1885)—*Occupancy right is statutory right.*

A right of occupancy under the Bengal Tenancy Act, 1885, appears to be a statutory right, and is not conferred by a gift from a proprietor. [P 80, C 2]

(*b*) *Bengal Tenancy Act*, (*amended by Act. I of* 1907) *S.* 120 (2*a*)— *Admission in kabuliyat as to character of land is relevant*—"*Agreement or compromise*" *is one relating to character of land.*

The admission in the kabuliyat as to the character of the land is relevant evidence and admissible, and the question of its probative force is a question of fact. It is immaterial whether the admission is made subsequent to the 2nd March 1883 or prior. This view is not displaced by S. 2a of Bengal Act I of 1907. The words: "any agreement or compromise" in S. (2a) must refer only to an agreement or compromise, of a question in discussion as to the character of the land at the time when the agreement or compromise was made. If, when land is let in Bengal or Bihar there is no doubt, and consequently no discussion or compromise as to the character of the land, there is no reason why the agreement for letting of the land, lease, putta, or kabuliyat, which contains a statement of the charcter of the land, should not be admissible in evidence against a party to it: 13 *C. W. N.* 135, *Appr.* [P 83, C 1, 2]

A. M. Dunne and *S. Hyam*—for Appellant.

L. De Gruyther and *E. B. Raikes*—for Respondent.

Sir John Edge.—The suit in which this appeal has arisen was instituted on the 22nd December 1917, in the Second Court of the Subordinate Judge of Arrah by the Maharaja of Dumraon for possession of lands in mauzas Majharia and Khutaha in the district of Shahabad by the ejectment of the defendants. It was alleged in the plaint that the milkiat interest of the Dumraon Raj in the 16 annas of each of the mauzas belongs to the plaintiffs, and that his name stands recorded in respect thereof. The suit was brought against the two defendants Babu Parmeshwari Prasad Singh and his younger brother, Babu Bindeshri Prasad Singh, minors, zamindars, sons of Babu Kesho Prasad Singh, deceased, under the guardianship of their mother, Musammat Radha Kuar. Kesho Prasad Singh and the defendants constituted until he died a joint Hindu Mitakshara family. The second defendant died a minor and without issue after the suit was brought.

The defence is that the defendants had a right of occupancy in the lands from which it was sought to eject them. If that right of occupancy existed, it was acquired under the Bengal Tenancy Act, 1885 (Act VIII of 1885). The defendants were in possession, and under the circumstances of the case it was for the plaintiff to prove that he was entitled to eject them. Seven issues were framed: the third was the material issue. It was: "Have the defendants occupancy rights in the land in suit?" That issue practically depended on whether the plaintiff should succeed in proving that the lands in question were his zerait, private lands, as the proprietor. The Subordinate Judge found that the lands were not zerait land, and that the defendants had a right of occupancy in them, and made his decree dismissing the suit. From that decree the plaintiff appealed to the High Court at Patna, and the High Court finding that the defendants had no right of occupancy in the lands, reversed the decree of the Subordinate Judge, and gave the plaintiff the decree for ejectment and mesne profits which he claimed. From that decree of the High Court this appeal has been brought.

Before considering S. 120 of the Bengal Tenancy Act, 1885, which appears to their Lordships to be the section upon the true construction of which the fate of this appeal mainly depends, they will state, as briefly as may be, the history of the lands in question so far as that history is known to them.

All the lands in suit were in the bed of the river Ganges until shortly before 1843, but whether their position in the bed of the Ganges was owing to erosion or not their Lordships do not know. The lands to which the suit relates consist of 228 bighas, 11 kathas and 12 dhurs of land, which emerged from the Ganges shortly before 1843, and in 1843 became suitable for cultivation, and of 25 bighas, 14 kathas and 17 dhurs of land which in or shortly before 1902 emerged from the Ganges, and in 1904 were suitable for cultivation. The lands are contiguous, and were in the plaint alleged to be zerait of the plaintiff.

In 1843 the Government, which was carrying on a stud farm, got possession of all the lands which had then emerged from the Ganges, and thenceforward for about 30 years cultivated them for the purposes of supplying food and fodder for the horses at the stud farm. It does not appear whether the Government held the lands under a written lease or under an oral agreement. The Government surrendered the lands to the Maharaja of Dumraon in 1873, and quitted possession of them. It is not suggested that the Government on or after quitting possession of the lands made any claim to any interest in them.

After the Government quitted possession the Maharaja of Dumraon let the lands which the Government had held to a Mr. Fox for a term of years, and in 1883 let them to Mr. Fox for a further term of nine years. The kabuliyat which Mr. Fox executed in 1883 is dated the 21st June 1883, and in that kabuliyat Mr. Fox stated that he could "in no circumstances acquire occupancy right" in the lands, and that at the expiration of the term the proprietor (the Maharaja) shall have full power to keep the said land as his (sir) zerait or to settle with me or any other person." It is stated in the plaint that "after some time Mr. Fox was granted occupancy rights" in the lands by the Maharaja. That statement was not traversed in the written statement, and must be treated as admitted. The grant or gift of such right of occupancy appears to have been, as stated in the judgment of Mr. Justice Das in 1891, for valuable services rendered to the Raj by Mr. Fox. A right of occupancy under the Bengal Tenancy Act, 1885, appears to be a statutory right, and is not conferred by a gift from a proprietor. However that may be, Mr. Fox became in arrear for three years in the payment of the rent of the lands, and in 1895 the then Maharaja brought a suit against him for the arrears of the rent, and obtained in that suit a decree. In execution of that decree Mr. Fox's right and title to the lands were, on the 2nd March 1896, sold by auction, and were purchased by the Maharaja of Dumraon, and then such rights of occupancy, if any, as Mr. Fox had in the lands were extinguished.

After the 2nd March 1896, the Maharaja of Dumraon let the lands to one Akhauri Ram Udanaj Singh in shikmi right for a term of five years, who cultivated them himself or by his shikmi tenants. Akhauri obtained no right of occupancy in the lands, and in any case the defendants are not his representatives by assignment or otherwise.

By 1902 the 25 bighas, 14 kathas and 17 dhurs of land had emerged from the Ganges and had become suitable for cultivation, and on the 25th November 1902, all the lands in suit were let by Maharani Beni Prasad Kuari, proprietress and heiress, widow and executrix of Maharaja Sir Radha Prasad Singh of Dumraon, to Babu Kesho Prasad, the father of the defendants, for a term of seven years from 1309 to 1315 Fasli. A putta and a kabuliyat were exchanged between the parties. In each of those documents the lands which were let were described as zerait lands, and it was expressly agreed in each of them that no right of occupancy in favour of the tenant should accrue, that Kesho Prasad Singh was not entitled to transfer his interest in the lands to any other person, and that on the expiration of the tenancy the Maharani should be entitled to keep the land in her direct possession as zerait, or to let it to any person. In the specification at the end of each document the land let was described as Jaiwala zerait land. Kesho Prasad Singh remained in possession of the lands in suit under the putta and

kabuliyat of the 25th November, 1902, until he died. Upon the death of Kesho Prasad Singh, his sons, the defendants, under the guardianship of their mother, Mt. Radha Kuar, continued in possession of the lands as cultivating tenants, except during a temporary dispossession from some of them by trespassers who had no title, until the expiration of the term of seven years for which the lands had been let to their father, Kesho Prasad Singh, in 1902.

In 1908 the lands in suit were in the charge, custody and management of the Court of Wards, and on the 8th December 1908, Mt. Radha Kuar, the mother of the defendants, in her own name, but, in fact, on behalf of and in the interest of the defendants, took the lands in suit in temporary shikmi settlement for a term of nine years from 1316 to 1324 Fasli, and executed and gave to the manager of the Court of Wards a kabuliyat dated the 8th December 1908, in which she declared that she made of her own free will and accord the declarations contained in it after fully understanding everything without any pressure brought to bear upon her by anybody. The kabuliyat contained several declarations. It is only necessary to refer to the fifth, seventh, ninth and tenth declarations. The fifth declaration, so far as it is now material in this suit, was as follows :

It is incumbent on me that I should keep the aforesaid newly accreted sir zerait land as it is at present and maintain the boundaries thereof. I neither have nor shall have any right whatsoever to make any alteration in connexion therewith. I shall not allow anybody to encroach upon the aforesaid newly accreted sir zerait land and shall give timely information to the manager.

7. I have taken the aforesaid land in temporary shikmi settlement for the purposes of cultivation. I have no right either to plant or to get planted any tree or to construct a house, temple, mosque, dharamsala, or any other building and gola, etc. I shall not in any way change the status of the land whereby damage may be caused to the land and its productive power may be reduced and altered.

I neither have nor shall have any right to give either the whole or a portion of the land to anybody in shikmi settlement or to transfer it in favour of any person without the manager's sanction in writing.

9. I have no right to the said land other than that of cultivation during the period of settlement, and I neither have nor shall acquire in future, occupancy or other rights to the same. After the expiry of the term of the lease, the manager of the estate shall have the right either to take it in sir possession, or to settle it with any other person, or to make such other management as he may think proper, and I neither have nor shall have any objection to the same.

10. After the expiry of the term I shall surrender the aforesaid sir zerait newly accreted land. Should I fail to do so, I shall be considered a trespasser for the period it will remain in my illegal possession, and I shall be liable for the payment of damages and compensation for that period.

On the expiration of the term of nine years the defendants refused to give up possession, and hence this suit.

The position in which Mt. Radha Kuar was when she executed the kabuliyat in 1908 was a difficult one as she must well have known. The trespassers who had taken unlawful and forcible possession of some of the lands in 1906 were still in possession. In executing that kabuliyat of 1908 Mt. Radha Kuar must herself have understood the difficulties as to her own title and that of her sons, the defendants, to the lands in suit, or have had independent advice as to them and as to the kabuliyat which she should give to the manager of the Court of Wards.

As has been mentioned, in 1906, after the death of Kesho Prasad Singh, several persons who were mere trespassers and had no title to any of the lands in suit took forcible and wrongful possession of some of the lands in question in the suit, and ousted Mt. Radha Kuar and her sons, the defendants, and it became necessary for these defendants and their mother to obtain decrees in ejectment against the trespassers. In 1910 these defendants, under the guardianship of their mother, and their mother brought two suits in ejectment against the trespassers. In the plaints in each of those suits the lands are described as lands, the milkiat interest in which belonged to the Dumraon Raj, and the lands were stated to be zerait lands, and to have been recognized as such by village custom. The Subordinate Judge who tried those suits found that the cases of all the defendants to those suits were false, that the defendants were mere trespassers, and that the lands were zerait lands of the Dumraon Raj in the time of the Government Stud Farm, that Mr. Fox had no occupancy right in the lands and was in possession of them by cultivating them and sub-letting them for short periods, and that Akhauri and the plaintiff's father were in possession in the same way, and gave the plaintiffs decrees for possession. These decrees were obviously not collusive or obtained by fraud.

In 1885 the Bengal Tenancy Act, 1885 (Act VIII of 1885) was passed. It has been amended by the Bengal Tenancy (Amendment) Act, 1907 (Bengal Act No. 1 of 1907, by which (2-a) became part of S. 120.

The lands in suit were an estate within the meaning of the Act, and the Maharaja of Dumraon is the proprietor of the estate within the meaning of the Act. S. 120, as amended, is as follows:—

(1) The Revenue officer shall record as a proprietor's private land—

(a) Land which is proved to have been cultivated as khamar (zirait, sir) nij. nijjot (or kamat) by the propietor himself with his own stock or by his own servants or by hired labour for twelve continuous years immediately before the passing of this Act, and

(b) cultivated land which is recognised by village usage as proprietor's khamar (zirait, sir) nij, nijjot (or kamat.)

(2) In determining whether any other land ought to be recorded as a proprietor's private land, the officer shall have regard to local custom, and to the question whether the land was, before the second day of March 1883, specifically let as proprietor's private land, and to any other evidence that may be produced; but shall presume that land is not a proprietor's private land until the contrary is shown.

(2-a) Notwithstanding anything contained in any agreement or compromise, or in any decree which is proved to his satisfaction to have been obtained by collusion or fraud, a Revenue officer shall not record any land as a proprietor's private land unless it is proved to be such by satisfactory evidence of the nature described in sub-S. (1) or sub-S. (2).

(3) If any question arises in a civil Court as to whether land is or is not a proprietor's private land, the Court shall have regard to the rules laid down in this section for the guidance of Revenue Officers.

Previous to that amendment (2) and (3) had been variously construed by different Benches of the High Court at Calcutta, none of which seem to have considered themselves bound by any previous decision on the subject by a Bench of that Court and had not followed the constitutional principle of referring the question on which they differed from a previous decision of their own Court to a Full Bench to decide what, so far as the High Court was concerned, would be a binding decision on all the Benches of that Court. If such a question had been referred to a Full Bench, the Chief Justice would no doubt have appointed a Full Bench to consider such an important reference and to decide the question referred.

It is necessary for their Lordships to refer to these various decisions so far as they have been brought to their attention. They will now briefly do so.

In 1890, in *Nilmoni Chuckerbutti* v. *Bykant Nath Bera* (1) Prinsep and Bannerjee, JJ., held that "any other evidence that may be produced" in sub-S. (2) of S. 120 to show an assertion of any title on the part of the proprietor as to land as his private land must be an assertion communicated to the tenant before the 2nd March 1883.

In 1892, in *Sher Bahadur Sahu* v. *M. H. Mackenzie* (2) Bannerjee and Pratt, JJ., held that the mere fact that the land having been taken in lease on the 23rd August 1888, as zerait would not give to that fact any probative value, as the lease was not before the 2nd March 1883.

In *Sobhab Koeri and others* v. *Mahabir Prasad* (3) an unreported case, Mitra, J., appears to have taken a different view of the scope of S. 120.

In 1905 *Masudan Singh* v. *Goodar Nath Panday* (4) which came before Harington and Mookerjee, JJ., in January and February 1905, and was a suit in ejectment brought by a zamindar against a raiyat, and in which the defendant alleged that he had a right of occupancy in the lands, it was proved that he had admitted that the lands were kamat lands of the plaintiff. The trial Court had dismissed the suit, but the lower appellate Court, whose findings of fact, but not of law, had to be accepted as final by the High Court in second appeal, had found, on an admission made by the defendant that the lands were kamat lands, and had given the plantiff a decree in ejectment. In that case Mr. Justice Harington referring to Ss. 116, 120 and 178 of the Act, pointed out that the Court of first instance had found that the plaintiff had failed to prove that the defendant had held for a term or under a lease from year to year before the kabuliyat was made, in which was the admission that the lands were kamat lands, and held that the suit must be dismissed. Mr. Justice Mookerjee, treating "kamat" and "zerait" as synonymous terms, and referring to *Nilmoni* v. *Bykant* (1) *Sher Bahadur* v. *Mackenzie* (2) and *Sobhab*

(1) [1890] 17 Cal. 466.
(2) [1902) 7 C. W. N. 400.
(3) Special Appeal No. 2129 of 1901.
(4) [1905] 1 C. L. J. 456.

Koeri v. *Mahabir Parsad* (3) observed that the question raised in the appeal before them that is, that the admission made by the defendant in the kabuliyat was not admissible in evidence, was not free from doubt and that it was not necessary to discuss it, as the appellant, the defendant, was entitled to succeed on another ground, and agreed that the suit should be dismissed. The other ground need not be discussed by their Lordships, as it does not arise in this suit.

In 1908, in *Bhagtu Singh* v. *Raghunath Sahai* (5), which came before Mitra and Ball, JJ., on the 3rd July, 1908, in second appeal, the lower appellate Court had found that the land then in question was zerait land, on an admission made by the tenant in a kabuliyat which was dated after the 2nd March 1883. Mitra and Ball, JJ., held that the admission in the kabuliyat as to the character of the land was relevant evidence and admissible, and the question of its probative force was a question of fact for the lower appellate Court, and dismissed the appeal.

In 1914, in *Ganpat Mahton* v. *Rishal Singh* (6) Mookerjee and Beachcroft, JJ., held that a statement made in a kabuliyat executed after the 19th September 1902, being after the 2nd March 1883 that the land was zerait, was not admissible, not on the ground that it was not included in the expression "any other evidence that may be produced," but for the reason that when the Legislature expressly made evidence of letting before the 2nd March 1883, in proof of the character of the land, admissible, the Legislature must have intended to exclude evidence of letting after the 2nd March 1883, and they held that the defendants in that case must consequently be regarded as settled raiyats, as, in fact, they had been recorded.

Their Lordships agree with the construction of S. 120, before it was amended in 1907 by Bengal Act No. 1 of 1907, as adopted in 1908 by Mitra and Ball, JJ., in *Bhagtu Singh* v. *Raghunath Sahai* (5). Did the addition of (2a) by the amending Act make any and what difference so far as this appeal is concerned?

(5) [1908] 9 C. L. J. 15=1 I. C. 571—13 C. W. N. 135.

(6) [1914] 20 C. W. N. 14—33 I. C. 978.

Sub-section (2) of S. 120, as their Lordships construe it, does not exclude as inadmissible evidence that subsequent to the 2nd March, 1883, the tenant admitted that the lands let to him were zerait lands of the landlord; such an admission is relevant and admissible evidence, but it is probative evidence only, which, like any other relevant fact, has to be considered, and such weight given to it as under the circumstances of the case it is entitled to have. For instance, to put an extreme case, if it should appear to the Judge trying such a case that the admission was made contrary to the fact by a person anxious to obtain a lease of the lands from the landowner refusing to let unless the admission was made, its probative value would be worthless and might be disregarded; but if the admission were made in a case in which it was doubtful on the evidence whether the lands were the zerait or *sir* lands of the proprietor, the admission might in the opinion of the Judge hearing evidence be valuable as enabling him to arrive at a conclusion on contradictory evidence of fact.

The question is; What does (2a) of S. 120 mean? It is clear that land cannot be recorded as a proprietor's private land by reason of its having been decided to be such private land by a decree which was proved to the satisfaction of the Revenue Officer to have been obtained from the Court by collusion or fraud. And it is also clear that nothing in such a decree can affect the character of the land if it is proved to the satisfaction of the Court in a suit of ejectment that the decree was obtained by collusion or fraud. But what is the meaning of "any agreement or compromise" in (2a)? In their Lordships' opinion "any agreement or compromise" in (2a) must refer only to an agreement or compromise of a question in discussion as to the character of the land at the time when the agreement or compromise was made. If when land, is let in Bengal or Bihar there is no doubt, and consequently no discussion or compromise as to the character of the land, it is difficult for their Lordships to understand why the agreement for letting of the land, lease, putta, or kabuliyat, which contains a statement of the character of the land, should not be admissible in evidence against a party to it. It does not therefore appear to their

S. N. Das
Advocate High Court

Lordships that sub-Section (2a) displaces the view taken in the case of *Bhagtu Singh* v. *Raghunath Sahai* (5) which their Lordships have approved.

But quite apart from that and even if their Lordships had taken a strict view in favour of the appellant of S. 120 the Bengal Tenancy Act, 1885, as it now stands, and irrespective of the putta of 1902 and the kabuliyats of 1883 and 1892, still having regard to the facts that the lands which the Government held for 30 years were used by the Government for similar purposes as they would have been used by the Maharaja of Dumraon if he had been the owner of a stud farm, that no one claimed any right in any of them as a settled raiyat or, except trespassers without any title, as having an occupancy right in any of them, and to the statements as to the character of the land by the defendants and their mother in the plaints of 1910, when they were plaintiffs in the suits against trespassers to which their Lordships have referred, and to the kabuliyat given in 1908 by Mt. Radha Kuar to the Manager of the Court of Wards, their Lordships find that there was ample admissible evidence that the lands were zerait of the Dumraon Raj, and that the defendants had no right of occupancy in them.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be dismissed with costs, and that the decree of the High Court should be affirmed.

Appeal dismissed.

Solicitors for Appellant — *Barrow, Rogers & Nevill.*

Solicitors for Respondent--*Watkins & Hunter.*

A. I. R. 1926 Privy Council 84

(*From Madras* : *A. I. R.* 1924 *Mad.* 236.)

28th January 1926.

VISCOUNT DUNEDIN, MR. AMEER ALI AND SIR ARTHUR CHANNELL.

Hajee Shakoor Gany, since deceased (now represented by Dawood Hajee Shakoor, minor)--Appellant.

v.

T. S. Sabapathi Pillai—Respondent.

Privy Council Appeal No. 118 of 1924.

Tariff Act (7 *of* 1894), *S.* 10 — *Duty payable is not reduced by reduction in the tariff value of an article between the making of contract and taking delivery.*

A change in duty means a change in the rate of duty. If there is a change in the rate between the making of the contract and delivery of goods, the change may be a ground for claim by the buyer. But a decrease in the tariff valuation in that period does not entitle the buyer to claim any such deduction. [P. 84, C. 2]

G. R. Lowndes and *C. B. Raikes*—for Appellant.

E. Labouchere Thornton—for Respondent.

Facts.—(*vide A. I. R. Mad.* 236). The plaintiff contracted to purchase in December 1922 from defendant Java sugar to arrive about the end of the year. After the contract but before delivery the tariff valuation was reduced by Government Notification and the buyer claimed a reduction in the price owing to the reduction in tariff valuation. The case was tried by Coutts-Trotter,, J, and the plaintiff was given a decree. This decree was upheld in appeal. The defendant therefore appealed to the Privy Council.

Viscount Dunedin.—Their Lordships are of opinion that this case is clearly governed by the judgment of their Lordships' Board in *Probhudas* v. *Ganidada* (1).

They will, therefore, humbly advise His Majesty that the appeal should be allowed, the decrees of both Courts below set aside, and judgment entered for the appellant with costs here and in the Courts below.

Appeal allowed.

Solicitors for Appellant—*T. L. Wilson & Co.*

Solicitor for Respondent—*R. A. Newton.*

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(1) A. I. R. 1925 P. C. 157.

A. I. R. 1926 Privy Council 85

(*From Allahabad*)

17th May 1926

LORDS BLANESBURGH AND DARLING AND SIR JOHN EDGE.

Pancham and *others*—Appellants.

v.

Ansar Hussain and *others*—Respondents.

Privy Council No. 84 of 1924 and Allahabad Appeal No. 28 of 1921.

(*a*) *Practice — Plea — Cause of action once abandoned cannot be availed of.*

Where plaintiff mortgagee first alleged that the date of the cause of action was the date when the agreed term expired, viz. 21st February 1905, but later on amended the plaint by saying that it was the date when there was a default in payment of an instalment on the agreed date, viz., 21st February 1894 according to the terms agreed to in the mortgage deed and alleged, but failed to prove, payment of interest on later dates.

Held: that he could not be allowed to revert to the position taken in the unamended plaint with respect to the cause of action. [P 88 C 1]

(*b*) *Limitation Act, Art.*, 132—*Scope.*

English Limitation Act or decisions thereunder do not apply to words of the article (obiter.) [P 86 C 1]

(*c*) *Limitation Act, Art.* 132—*Starting point* (*Quaere*).

Whether a provision in a mortgage bond making amount payable before fixed term, on default of debtor in payment of an instalment makes limitation run against the mortgagee; view in 37 *All.* 400 (*F.B.*) and *A. I. R.* 1923 *All.* **1** (*F. B.*) that it does even against the mortgagee's desire referred to but not discussed. [P 87 C 2]

A. Majid and *F. P. Law*—for Appellants

Lord Blanesburgh.—This is a suit to enforce, by the sale of property taken as security, payment of the sum said to be due upon a mortgage. The only question which now remains for decision is whether the appellants' right to maintain the suit is barred by limitation. The Subordinate Judge of Allahabad, on grounds to which their Lordships will return, by his judgment of the 31st May 1918, held that the right was barred: the High Court at Allahabad, in its judgment on appeal on the 12th April 1921, reached the same conclusion, but on other grounds. The plaintiffs, the mortgagees, appeal.

The defendants, successors of the original mortgagors, were not represented by counsel before their Lordships.

Although the issue now is one of limitation only, a short statement of the position as a whole will not be out of place.

The mortgage deed in suit is dated the 21st February 1893. It purports to have been granted by one Saiyid Zawar Husain and his mother, Mt. Sadar-un-nisa Bibi. She was a pardanashin lady. The deed is not executed by her, but by her son on her behalf. Both are long since dead. The son died in 1911, the mother in 1914. As a result all the facts in relation to the original transaction will probably now never be ascertained with accuracy. For this the appellants must be held responsible. Proceedings in relation to the mortgage were delayed by them until long after the death of the principal actors in the transaction. Nor has any explanation of their prolonged inaction been offered.

The mortgage bond is expressed to be for Rs. 4,000. The loan carries interest at a rate equivalent to 10 per cent. per annum. The time fixed for repayment is 12 years, but the mortgagors covenant to make an annual payment of Rs. 500 on account of principal and interest, while the bond further provides that unpaid interest shall be treated as principal and shall carry interest at the same rate. The property mortgaged is of two classes, pure Zemindari in certain mauzas in the Allahabad District now in possession of the respondents, and 13 items of property held in mortgage from other persons and sub-mortgaged by the mortgagee in suit.

In the long interval these secured debts so sub-mortgaged have disappeared. The only property now effectively included in the appellants' mortgage is the immovable estate above referred to.

Their suit was instituted on the 21st February 1917, 24 years after the execution of the bond. A day later, and it would on any view have been hopelessly out of time. Whether it was then maintainable is the question at issue. The sum claimed for principal and interest as at the date of the plaint was no less than Rs. 34,000, an amount far in excess of the value of the mortgaged property.

There were in the suit other issues than that of limitation. Although these no longer survive, their nature, and the difficulty, perhaps the impossibility, of solving them satisfactorily so long after the event and with the two mortgagors

dead, emphasizes the embarrassment caused by the inexplicable delay of the mortgagees in putting their claims to the test. Shortly stated, they were these.

First, as has already been said, the mortgage is not executed by the lady and the son, so the defendants alleged, had no authority to execute it on her behalf : the lady was literate and did not need to have deeds executed for her. It may be doubted whether the certain truth, on this issue, will ever be known. The trial Judge however, in the result, repelled the plea of the defendants, and there that matter rests. A second defence to the suit was that no consideration for the mortgage had been received by the mortgagors. This defence was, in part, successful. The trial Judge, after prolonged inquiry, held that Rs. 3,000 and no more had been advanced by the mortgagees. To this view the High Court adhered, and that finding was not, before their Lordships, further questioned by the appellants. On the other hand, the plaintiffs alleged that the mortgagees had received from time to time instalments on account from the mortgagors. This allegation of theirs has been rejected, and is no longer persisted in. This particular matter, however, is referred to now, only as an introduction to the next statement. It will be more conveniently dealt with in a later portion of this judgment. So far, the result upon which their Lordships must act is that there is a mortgage of immovable property duly executed by the predecessors-in-title of the defendants to secure an advance of Rs. 3,000, repayable in 12 years with interest at the rate of 10 per cent. per annum capitalized in case of non-payment. Thereunder the mortgagors are taken bound to pay Rs. 500 in every year on account of principal and interest, but no payment whatever on any account has been made since the date of the mortgage, the 21st February 1893. Is a suit to enforce such a security, commenced on the 21st February 1917, barred by statute ? That is the question.

If there were no more to be said it is on all hands agreed that great as is the delay the answer must be in the negative. The suit is one to enforce payment of money charged upon immovable property to which S. 132 of the Limitation Act applies. The period of limitation fixed by that section is 12 years from the date when the money sued for became due. The date by the deed fixed for payment of principal and capitalized interest was the 21st February 1905, and the plaint in the suit is filed within 12 years of that date, viz., the 21st February 1917.

But the mortgage bond contains a further clause to which no reference has so far been made. The clause is as follows :

> Moreover, be it known that if the hypothecated property is advertised for sale or farmed out in execution of the decree of any other decree-holder, or on account of the arrears of the Government revenue, or if anyone else acquires any right to the hypothecated property, or if there is any breach of faith, or any default in payment of rupees five hundred per annum, as aforesaid, on the part of us, the executants, or if there appears to the aforesaid creditor, any weak or strong apprehension of the loss of the principal or of the hypothecated property, then in all or any particular circumstances, the aforesaid creditor has power, without waiting for the expiry of the stipulated period, and by cancelment of the stipulations embodied in this document, to institute a suit in Court, to obtain a decree, and to realize the entire principal together with interest and costs, from our person and from our hypothecated property specified at the foot.

This was the clause by reference to which the High Court, taking cognizance only of the fact that the mortgagors had made default in payment to the mortgagees on the 17th February 1894, of the stipulated sum of Rs. 500, decided the issue of limitation in favour of the respondents. Applying certain previous decisions of that Court, and in particular a Full Bench decision in *Gaya Din* v. *Jhumman Lal* (1) the High Court held that under a clause in the above form a single default on the part of the mortgagors, without any act of election, cancellation or other form of response or acceptance on the part of the mortgagees, and even, it would appear, against their desire, operates, *eo instanti*, to make the money secured by the mortgage "become due," so that all right of action in respect of the security is finally barred twelve years later, that is, in the present case, on the 21st February 1906. All this the High Court held, notwithstanding that the mortgage is for a term certain, a provision which may be as much for the benefit of the mortgagees as of the mort-

(1) [1915] 37 All. 400=28 I.C. 910=13 A.L.J. 510 (F. B.).

gagor, and notwithstanding that the proviso is exclusively for the benefit of the mortgagees. The decision also apparently proceeds upon the view that the words of the English Limitation Act and the English decisions thereon apply without question to the words of Art. 132 of the Indian Act, a conclusion which, as it seems to their Lordships, may involve, and, on the critical point when applied to such a proviso as the present, a large assumption.

Their Lordships are fully alive to the seriousness of the view so taken by the High Court, emphasized and perhaps extended as it has been by a later Full Bench decision to the same effect: see *Shib Dayal* v. *Meharban* (2). Moreover, upon the correctness of it there has been in different High Courts of India a sharp conflict of judicial opinion. It is accordingly manifestly desirable that, so soon as may be this Board should finally pronounce not only upon the question whether the principle of the two decisions in 37 *All.* and 45 *All.* is correct, but also upon the further question whether, even if it is, these decisions have any application to a proviso framed as is that now in suit. Their Lordships would be reluctant, however, to pronounce on either question in the absence of full argument, and it is accordingly a satisfaction to them to find that the present case, in which they have had no assistance from the respondents, can, as they think, regardless of the general question, be decided on its own special circumstances which, apparently, the High Court was not concerned to note.

The position is this. Whatever else in relation to such provisos as the present may be open to debate, one thing is clear, viz., that such a default on the part of the mortgagors as was here relied on by the High Court gave to the mortgagees a right by appropriate action to make the mortgage moneys immediately due, and the special circumstance in this suit is that, from the date of their amended plaint in it, the appellant's case necessarily imported that the mortgagees had—if it was necessary for them so to do—brought about that state of things, and that the appellants' right to a decree was to be judged of on that basis. A short reference to the plaint and amended plaint will make this clear:

In fulfilment of the obligation in that behalf imposed on plaintiffs by O. 7, R. 1 (e) of the Code, para. 7 of the plaint alleged as follows:

> The cause of action for this suit accrued on the 21st February 1905, ... within the local limits of the jurisdiction of this Court. The case is cognizable by this Court.

The plaint presented in this form on the 21st February 1917 was, in pursuance of O. 7, R. 11 (*d*) of the Code, on the 23rd February 1917, rejected with this note:

> Under the terms of the mortgage deed, the cause of action for this suit accrued to the plaintiffs on the 21st February 1894, when the first instalment was not paid. The suit is beyond time with reference to the said date. The plaintiffs have not shown in the plaint why the suit is not time barred.

The reference there, of course, is to O. 7, R. 6 of the Code.

In consequence of this deliverance the plaintiffs under order amended paragraph 7 of their plaint, and it was on that paragraph as so amended that they went to trial.

The amended paragraph runs as follows:

> The cause of action for this suit accrued on the 21st February 1894. . . . . within the local jurisdiction of this Court, as also on other different dates, namely, the 15th of December 1899, the 9th of January 1901, the 15th of February 1902, the 15th of January 1903, the 16th of January 1904, and the 10th of April 1906, when the interest was paid. The case is cognizable by this Court.

In their Lordships' judgment the meaning of this amended allegation is not to be mistaken. First of all the plaintiffs thereunder definitely abandon the contention on which their whole appeal now rests, viz., that their cause of action did not accrue until the 21st February 1905. Secondly, the plaintiffs' assertion that the cause of action accrued to them on the 21st February 1894, an allegation be it remembered which is not traversed in any written statement, involves the assertion that all conditions on their part were fulfilled, if any had to be done, to bring about that result as well as an assertion that the result was attained. Further, the allegation now is that the suit, which would otherwise have been out of time, is exempted from limitation only by the payments of interest specified. That henceforth was the plaintiffs' only case, and it would have succeeded if these payments had been proved. But the plaintiffs' attempt to prove them, as has

(2) A. I. R. 1923 All. 1 (F. B.).

been stated, entirely failed, and no suggestion that any such payment had been made or received was even presented to the Board by the appellants' counsel. Having made a finding of fact in the same sense, the trial Judge, by his judgment of the 31st May 1918, dismissed the suit with costs. That was, their Lordships think, his proper course. No other issue was, or is, on the pleadings, open to the plaintiffs, and their conduct in this matter is not such as to entitle them to claim any more than strict treatment. On their own chosen issue they fought; to that issue they directed evidence which was not believed; on it, therefore, they failed. And by that failure they must abide. Their appeal to the High Court should have been dismissed, as their Lordships think, on the same ground. The contention which that Court combated by its deliverance already referred to was not on their pleadings open to the appellants, who, for the same reason, cannot on their appeal to this Board be heard to say, as they must say, if the appeal is to succeed, that their cause of action did not accrue to them until the 21st February 1905, an allegation which, originally made, was, as has been seen, deliberately abandoned in their amended plaint.

Their Lordships accordingly, without pronouncing in any way upon matters which must one day call for most serious consideration at the hands of the Board, think that this appeal should be dismissed on the short ground that the appellants are committed to the position that their cause of action accrued to them on the 21st February 1894, and that their suit, in the absence of any payment or acknowledgment by the mortgagors, was barred long before the date on which it was instituted; in point of fact it was barred on the 21st February 1906.

On that ground their Lordships will humbly advise His Majesty that this appeal should be dismissed.

Appeal dismissed.

Solicitors for Appellants—*A. De Freece & Co.*

A. I. R. 1926 Privy Council 88

(From Baluchistan)

18th March 1926.

VISCOUNT HALDANE, LORD PHILLIMORE AND MR. AMEER ALI.

Haveli Shah and *another*—Appellants.

v.

Khan Saheb Shaikh Painda Khan—Respondent.

Privy Council Appeal No. 64 of 1925.

(a) *Lim. Act, Art. 27—Suit for compensation for inducing breach of contract is governed by the article.*

Where the act complained of was that defendant had improperly got away from the plaintiff, a large number of camels controlled by the the plaintiff for the purposes of his contract but the real complaint was that the defendant had improperly enticed the jamadars of the plaintiff into breaking their contracts by putting the animals which they had contracted to supply to him at the disposition of the plaintiff himself. [P 89 C 1]

Held: that the suit for compensation was governed by Article 27.

(b) *Jurisdiction—Wrong committed in Persia.*

Where the wrong was committed in Persia, the Consular Court for the district of Sistan would have jurisdiction to adjudicate on it. [P 89 C 2]

(c) *Civil P. C., S. 19—For damage done in Persia, defendant carrying on business at Quetta though resident in Punjab, can be sued at Quetta—Civil P. C., S. 20.*

Where defendant is ordinarily resident in the Punjab but carried on bussiness at Quetta he can be snad in Quetta though the cause of action took place in Persia. [P 89 C 2]

(d) *Civil P. C., O. 1, R. 10—Party discharged and reinstated again is a party only from date of reinstatement—Lim. Act S, 22*

Where the defendants were first made defendants as sons and legal representatives of the deceased tort feasor but were discharged and the estate of the deceased was made defendant and the first defendants were again reinstated as defendants.

Held: the suit must be deemed to be filed as on the date of reinstatement. [P 91 C 1]

G. Lowndes and *A. Majid*—for Appellants.

W. Schwabe and *H. Collins*—for Respondent.

Viscount Haldane.—This is an appeal from the Court of the Judicial Commissioner in Baluchistan. The appellants are minors and are the sons of one Lala Sundar Dass, who died in October, 1921. There was a claim made by the respondent against the deceased on 24th March, 1921, before H. M. Consul for Sistan in Persia. After the death of Lala Sundar Dass the Consul transmitted the claim to

the Political Agent at Quetta, which is in Baluchistan. The case stood over until a guardian to the sons had been appointed. This appears to have been directed by order made by the Political Agent at Quetta. On 7th July, 1922, Mustapha Khushal Devi, the mother of the two sons, was formally appointed guardian of the property and persons of the two minor sons by the Senior Sub-Judge of the Gujrat district of the Punjab, where the sons were resident. The guardian repudiated liability for the claim, and on 23rd November, 1922, a plaint was lodged in the District Court at Quetta by the respondent against the sons and the mother as their guardian.

The circumstances out of which the claim arose were these: The respondent, who was plaintiff, alleged that he and the deceased Sundar Dass, were rival transport contractors to the British Government in connexion with certain military operations carried out in Persia by a force known as the Eastern Persian Cordon in 1919 and 1920. The act complained of was that Sundar Dass had improperly got away from the respondent a large number of camels controlled by the respondent for the purposes of his contract. It was not disputed that this wrong, if it was committed, took place in Persian territory between the months of January and the end of October, 1920. These allegations were sufficiently precise to define the fashion in which the camels were taken away, assuming that they were so taken. But it is clear from what has been alleged that each of the two contractors for the provision of transport carried out their contracts in part at least by sub-contracts with jamadars, who hired camels locally from their particular owners and supplied them for use to the contractors. If so, and if the claim was well founded, the real complaint was that the late Sundar Dass had improperly enticed the jamadars of the respondent into breaking their contracts by putting the animals which they had contracted to supply to him at the disposition of Sundar Dass himself. In the plaint there are other allegations of direct seizure of the respondent's camels, and also of an agreement made under Government orders to pay the amount of the loss to the plaintiff due for wrong done. No particulars of such direct seizure or of such an agreement appear to have been brought before the Court, and their Lordships think that the real case set up by the plaintiff was probably one of enticing the jamadars into breaking their contracts with the plaintiff.

The claim was the subject in the first instance, of complaint, on 29th November, 1919, to the British Consul at Sistan against the conduct of Sundar Dass, and subsequently in a letter of 24th March 1921, the respondent requested the Consul to recover for him from the latter the amount of his loss. The Consul was a judicial as well as an executive officer, and it was open to the respondent to have instituted proper proceedings in the Consular Court for recovery of the amount. This he did not do. The Consul, on 28th November 1921, reported the claim to the Political Agent at Quetta, who said that nothing could be done there until a guardian of the property of the deceased Sundar Dass had been appointed. This, as already stated, was subsequently accomplished.

Their Lordships have examined the documents relating to what took place in Sistan, and they are of opinion that no legal proceedings were taken in the Consular Court there or anywhere until the case was launched in Quetta. The wrong, if committed, was probably committed in Persia, and the Consular Court for the district of Sistan would have had jurisdiction to adjudicate on it, but no steps to this end were taken. There was no more than the informal complaint which was ultimately referred to Quetta. As to the jurisdiction of the Court there, their Lordships do not see their way to hold that there was not jurisdiction. Sundar Dass had in his lifetime carried on a large amount of business there, and the place was one where it was natural that his accounts should be settled up. Although Sundar Dass appears to have been ordinarily resident in the Punjab there is no doubt that he carried on business at Quetta, and their Lordships think that it was open to the respondent to sue him there under the provisions of Ss. 19 and 20 of the Code of Civil Procedure. This was the course taken; for, on 23rd November 1922, the respondent instituted a suit in the Court of the District Judge at Quetta against the late Sundar Dass's two sons, and their mother as their guardian, to

recover Rs. 6,88,350 as damages for tort or alternatively as damages for breach of an alleged agreement to pay Rs. 150 for each camel wrongfully taken from the plaintiff.

Their Lordships feel bound to observe on the unfortunate history of this litigation in the Courts at Quetta. There were not only delays caused by divergences of judicial opinion, but in some instances the Judges reconsidered conclusions to which they had come, and the parties were in consequence exposed to uncertainty and expense. For example, the order, on 20th January 1923, of the District Judge at Quetta, finding that a cause of action arose there, and that his Court had jurisdiction, was on the 22nd March following recalled by the Judicial Commissioner, and the case was returned to the lower Court for further inquiry. As the result of this, the District Judge found, in an order made on 19th April 1923, that he had no jurisdiction. On 12th June the Judicial Commissioner, however, came to the conclusion that after all there was jurisdiction. A petition of the sons for leave to appeal to the Privy Council against this was refused on the ground that the provisions of the Civil Procedure Code relating to the grant of leave to appeal to the Privy Council were not in force in Baluchistan. The Judicial Commissioner had also held, by his order of 12th Jnne 1923, that the names of the sons should be struck out as defendants, and those of the administrators of the estate of Sundar Dass substituted, but that the suit could nevertheless go on as framed. This gave rise to fresh questions as to the liability of the estate of a deceased as a tort-feasor after his death. At this stage Mustapha Khushal Devi, the mother of and guardian of the two minors, claimed that, as she was not administratrix of the estate, she should not be called on to defend the suit. There had been a reference by the Local Governments of the Punjab and of Baluchistan to the Governor-General in Council in 1922 to decide in which of these countries there should be proceedings for the appointment of a guardian of her sons and of the property of the deceased, and a decision had been given on the reference that the matter should be disposed of in the Court of the Senior Sub-Judge at Gujrat in the Punjab. The result of this was that in July 1922, the Sub-Judge himself was appointed official trustee for the sons and the mother was appointed their guardian. As the result of consideration, the Judicial Commissioner at Quetta came to the conclusion that his own order of 12th June 1923, had been wrong, and that the two sons should be restored to the record as defendants through their mother and guardian. This was on 21st June 1924.

After the order made on 12th June 1923, striking out the names of her sons as defendants, the sons applied to the Sovereign in Council for leave to appeal on this question of the jurisdiction of the Court at Quetta. They contended that if the suit went on, even in its new form, they would be affected. On the 20th November 1923, the Judicial Committee held that, as the sons had been struck out, no application from them for leave to appeal could be entertained. The effect, however, of the order of the Judicial Commissioner just referred to professes to be to restore the sons as defendants.

Since then the suit has pursued its course. Questions of limitation and of the suit being now out of time have been raised, and also questions as to the jurisdiction of the Courts at Quetta, and as to the effect of the order of the Judicial Commissioner purporting to restore the names of the appellants as defendants. The question of jurisdiction their Lordships have already disposed of. That as to limitation becomes important. The schedule of the Limitation Act of 1908 prescribes, under Art. 27, that a suit is to be barred after one year from the date of breach if it is one for compensation for inducing a person to break contract with the plaintiff. Under Art. 36 a suit for compensation for any malfeasance, misfeasance, or non-feasance independent of contract, and not specially provided for in the Act, is to be barred in two years. By Art. 49 compensation for wrongfully taking or detaining specific moveable property must be claimed within three years, and by Art. 115 compensation for the breach of any contract, express or implied not in writing registered, and not in the Act specially provided for, is to be claimed within three years.

In their Lordships' view, the real claim made in these proceedings is one which falls under Art. 27 above quoted. As it is common ground that the wrong alleged was committed not later than the end of October 1920, it is clear that this claim is barred by limitation. For the date of the first plaint at Quetta is 23rd November 1922, and there was, in their Lordships' view, no judicial proceeding before that in Sistan.

But the matter does not end there. By his order of 12th June 1923, the Judicial Commissioner struck out the names of the sons, who are the present appellants, as defendants, and substituted as the only defendants the administrators of the estate of Sunder Dass. The suit was thereby brought to an end as against the sons. On 21st June 1924, the Judicial Commissioner reviewed this order and altered it. He held that as no formal letters of administration had been taken out, the previous order was wrong and he directed, but only after the lapse of a year, the names of the sons to be restored as defendants through their mother and guardian. The original plaint of November 1922, against the sons had been superseded by a plaint of 10th July 1923, amended in accordance with the Commissioner's earlier order so as to be directed against the estate alone.

This amended plaint is again to be superseded by one in which the suit is to be one against the sons alone. The latter now come before the King in Council, and not unnaturally ask that the plaint thus amended should be treated as instituting a new suit, and they claim that this suit is out of time and barred by limitation, inasmuch as more than three years have elapsed between the alleged wrong in October 1920, and 21st June 1924, when their names were re-inserted. Whatever the nature of the action they say, be it for enticement or for simple tort, or for any breach of contract that has been suggested, they are now entitled to have it dismissed as against them as being out of time.

To this contention their Lordships do not see any answer. They think that the appellants are entitled to succeed on this point.

As the appellants have been wrong on the question of jurisdiction, and as the parties generally cannot be themselves wholly dissociated from the unsatisfactory course which the proceedings have followed, there will be no costs of this appeal awarded to either of the parties. The suit will simply be dismissed without costs as against the appellants.

Their Lordships will humbly advise His Majesty accordingly.

Suit dismissed.

Solicitors for Appellants — *Ranken, Ford* and *Chester.*

Solicitors for Respondent—*Bracewell* and *Leaver.*

A. I. R. 1926 Privy Council 91

(*From Allahabad*)

17th May 1926.

VISCOUNT DUNEDIN, LORD BLANESBURGH AND SIR JOHN EDGE.

Chandra Shekhar Bakhsh Singh and *another*—Appellants.

v.

Mt. Raj Kunwar—Respondent.

Privy Council Appeal No. 88 of 1923, and Allahabad Appeal No. 15 of 1920.

(*a*) *Hindu Law—Adoption—Proof.*

Reiterated declarations by the adopted son himself, extending over a number of years, that he was adopted son is sufficient proof of adoption against him when he is denying the adoption. [P 93 C 1]

(*b*) *Custom—Proof—Custom, though not unique nor unknown, must be proved to be ancient and proof conclusive.*

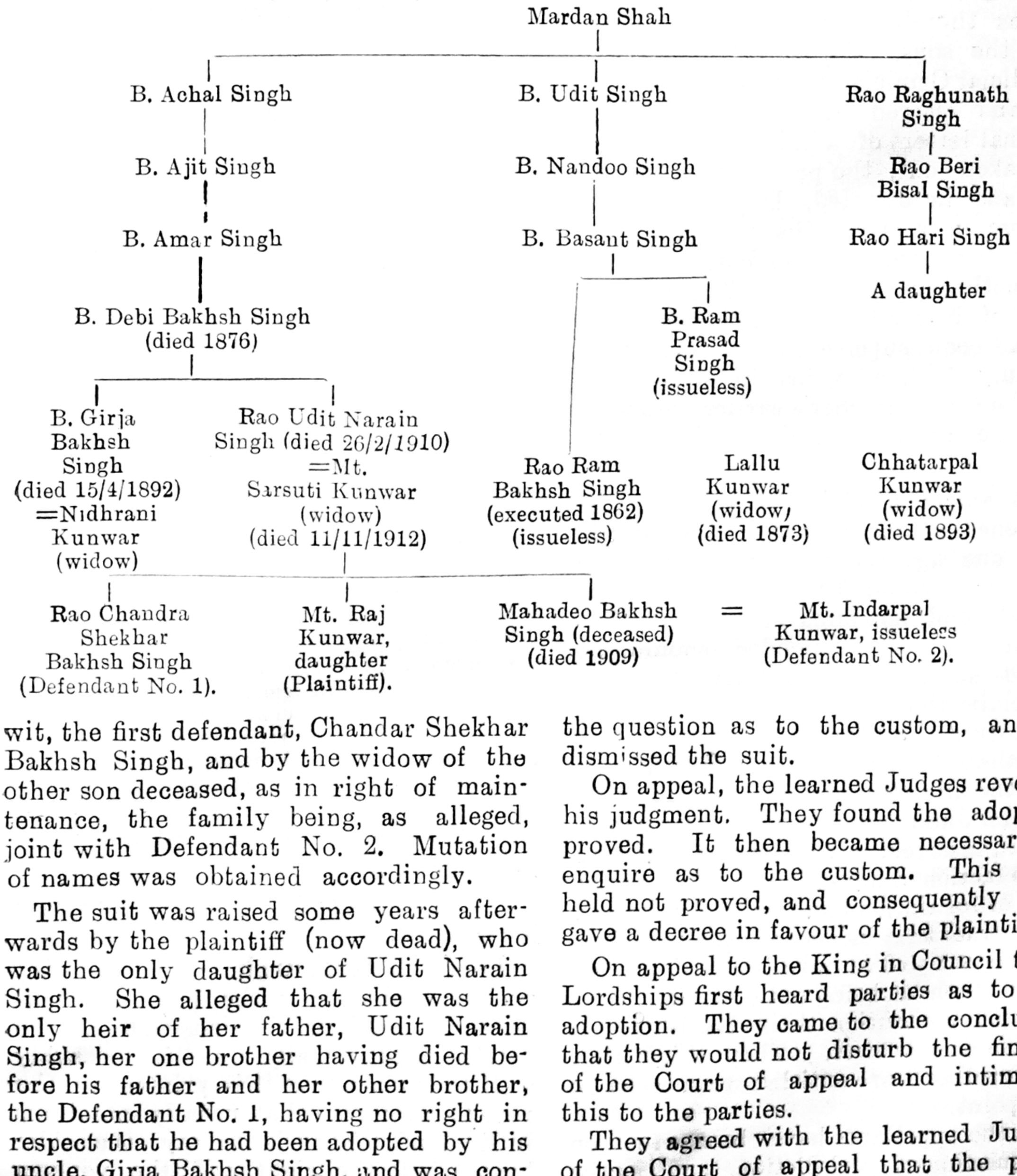
A custom, in a Hindu family governed by Mitakshara, excluding females from inheritance, though not unique nor unknown, must be proved to be ancient and the proof thereof conclusive. The general law would be weakened if this rule were not always strictly adhered to even in such cases. [P 93 C 1]

L. DeGruyther and *W. Wallach*—for Appellants.

G. R. Lowndes, and *B. Dube* — for Respondent.

Lord Blanesburgh.—The following pedigree taken from the pleadings will serve to explain the position of the parties in this case. It is probably well to explain that it is printed in the reverse way from that usually obtaining in England. That is to say, the elder branch is to the right and the younger to the left.

The subject of contest ranges round certain villages situated in Fattehpur. They were in the possession of Rao Ram Bakhsh Singh, who was executed after the Mutiny, and his property forfeited. The villages were given back to his senior widow, Lallu Kunwar. After her death they were possessed by his junior widow, Chhatarpal Kunwar, till her death in 1893. On her death they passed to and were enjoyed by Udit Narain Singh, who possessed them till his death in 1910. After his death his widow, Sarsuti Kunwar, had possession till her death in 1912. On her death possession was obtained by the only surviving son of Udit Narain Singh, to



wit, the first defendant, Chandar Shekhar Bakhsh Singh, and by the widow of the other son deceased, as in right of maintenance, the family being, as alleged, joint with Defendant No. 2. Mutation of names was obtained accordingly.

The suit was raised some years afterwards by the plaintiff (now dead), who was the only daughter of Udit Narain Singh. She alleged that she was the only heir of her father, Udit Narain Singh, her one brother having died before his father and her other brother, the Defendant No. 1, having no right in respect that he had been adopted by his uncle, Girja Bakhsh Singh, and was consequently for succession purposes no longer the son of his natural father. To this Chandar Shekhar Baksh Singh, who will hereinafter be spoken of as the only defendant, the only right of property being in him, replied first by denying the fact of his adoption by his uncle, and second by saying that, even assuming the adoption proved, he was entitled to succeed as the nephew of his natural father, there being a custom in the family to exclude females from succession. Proof was led at great length on both sides.

The learned trial Judge held that the adoption was not proved. It, therefore, became unnecessary for him to consider the question as to the custom, and he dismissed the suit.

On appeal, the learned Judges reversed his judgment. They found the adoption proved. It then became necessary to enquire as to the custom. This they held not proved, and consequently they gave a decree in favour of the plaintiff.

On appeal to the King in Council their Lordships first heard parties as to the adoption. They came to the conclusion that they would not disturb the finding of the Court of appeal and intimated this to the parties.

They agreed with the learned Judges of the Court of appeal that the proof rested on the reiterated declarations by

Chandar Shekhar Bakhsh Singh himself, extending over a number of years, that he was the adopted son of Girja Bakhsh Singh.

The parties were subsequently heard at great length on the question of custom. Under the Mitakshara Law the plaintiff would succeed. It is, therefore, for the defendants who alleged a custom to prove it, and it has been laid down again and again that the custom must be ancient and the proof conclusive.

Their Lordships feel that the general law would be weakened if this rule were not always strictly adhered to even in a case like the present, where the custom alleged is neither unique nor unknown. Their Lordships have accordingly approached the consideration of the case in this attitude of mind, and having read the voluminous evidence adduced, and duly weighed the careful and elaborate arguments of counsel on both sides, they have reached, not without hesitation and, in the special circumstances of this case, not without some reluctance, the conclusion that they would not be justified in disturbing the finding of the Court below. The judgment is an exceedingly elaborate and careful one. The question, after all, is one of fact. The result affects this family alone. The decision of the learned Judges being what it is, no general question of law is involved.

In these circumstances, their Lordships think that no useful purpose would be served by any re-statement of the position in their own words.

The conclusion reached in the Court below must remain undisturbed and their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

Solicitors for Appellants — *Douglas Grant.*

Solicitors for Respondent —*S. L. Polak.*

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* * A. I. R. 1926 Privy Council 93

(From Patna)

15th June 1926

VISCOUNT DUNEDIN, LORD ATKINSON AND MR. AMEER ALI.

Saiyid Jowad Hussain—Appellant.

v.

Gendan Singh, since deceased, and *others*—Respondents.

Privy Council Appeal No. 28 of 1924, and Patna Appeal No. 21 of 1922.

* * *Limitation Act, Art.* 181—*Appeal filed against preliminary decree—Time for applying for final decree runs from appellate decree* : 38 *All.* 21 *Overruled.*

When an appeal has been preferred against a preliminary decree the time for applying for final decree runs from the date of appellate decree : 36 *All.* 350 (*P. C.*). *Ref.*; 39 *All.* 641 (*F. B.*),*affirmed* ; 38 *All.* 21 **overruled.**

[P. 94, C. 1]

H. R. Abdul Majid—for Appellant.

A. M. Dunne and *E. B. Raikes*—for Respondents.

Viscount Dunedin.—In this case the plaintiffs were mortgagees under a registered mortgage bond granted by the defendant. They raised action for the sum of Rs. 52,000 odd, said to be due under the mortgage. The defendant denied that the whole sum was due, as he said the plaintiffs had not given him credit for two sums of Rs. 11,000 odd and Rs. 8,000 odd, which he had paid, such payments having originally been endorsed on the bond, but the endorsations having been erased by the plaintiffs.

The Subordinate Judge gave effect to this contention, but made the ordinary preliminary decree for the sum of Rs. 19,000, being the sum due, with proper computation of interest, after allowing credit for the above-mentioned two sums. The date of this decree was 22nd February 1915. The six months of grace for payment would, therefore, expire on the 22nd August 1915. The mortgagees appealed against the decree. The appeal was heard, and the appeal dismissed on 21st May 1917.

On the 21st February 1919, application was made for a final decree. The defendants opposed the application on the ground that it was time-barred under Article 181 of the Schedule to the Limitation Act, 1908. The terms of that article of the Schedule are :

Applications for which no period of limitation is provided elsewhere in this Schedule ; period of limitation three years ; time from which period begins to run, when the right to apply accrues.

The three years had expired or had not expired according as computation fell to be made, as the defendants urged, from the time fixed for payment by the original decree, or, as the plaintiffs urged, from the date of the dismissal of the appeal. The Subordinate Judge gave effect to the contention of the plaintiffs.

On appeal the Court of appeal upheld the decision of the Subordinate Judge. The present appeal is against that judgment. The point, therefore, is simply whether the time runs, from the expiry of the time fixed by the original prelim. inary decree or from the date when on appeal against that decree the appeal was dismissed.

The appellant's counsel strenuously urged that the appeal was not against the decree, but only against the items in the decree. This is a complete misunderstanding. An appeal must be against a decree as pronounced. It may be rested on an argument directed to special items, but the appeal itself must be against the decree and the decree alone. Which date is then to be preferred? Their Lordships, agree entirely with what was said by Banerji, J., in the case of *Gajadhar Singh* v. *Kishan Jiwan Lal* (1).

It seems to me that this rule—the rule regulating application for final decree in mortgage actions—contemplates the passing of only one final decree in a suit for sale upon a mortgage. The essential condition to the making of a final decree is the existence of a preliminary decree which has become conclusive between the parties. When an appeal has been preferred, it is the decree of the appellate Court which is the final decree in the cause.

These words are all the more weighty that previously the learned Judge had in the case of *Madho Ram* v. *Nihal Singh* (2) held that when there had been an appeal against a preliminary decree, the limitation period applicable to an application for final decree ran from the expiry of the time for payment fixed by the original decree, and not from the disposal on appeal, a view which he candidly confessed in this case was erroneous. The point is put with admirable brevity by Tudball, J. :

When the Munsif passed the decree it was open to the plaintiff or the defendant to accept that decree or to appeal. If an appeal is preferred, the final decree is the decree of the appellate Court of final jurisdiction. When that decree is passed, it is that decree and only that which can be made final in the cause between the parties.

The same view was incidentally taken without comment by this Board in the case of *Abdul Majid* v. *Jawahir Lal* (3).

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

Solicitors for Appellant — *J. Page Thomas.*

Solicitors for Respondents — *W.W. Box & Co.*

(1) [1917] 39 All. 641=42 I. C. 93=15 A. L. J. 734 (F. B.)

(2) [1916] 38 All. 21=30 I. C 494=13 A. L. J. 985.

(3) [1914] 36 All. 350=23 I. C. 649=12 A. L. J. 624=27 M. L. J. 17 (P. C.).

* * A. I. R. 1926 Privy Council 94

(*From Lahore*: *A. I. R.* 1924 *Lah.* 337)

24th June 1926.

VISCOUNT DUNEDIN, LORD ATKINSON AND MR. AMEER ALI.

Dayal Singh—Appellant.

v.

Indar Singh—Respondent.

Privy Council Appeal No. 49 of 1924.

* * *Registration Act, S.* 17 (2) — *Document evidencing payment of over Rs.* 100 *as earnest money for a sale requires registration where buyer has not improperly refused to accept delivery— Registration .Act, S.* 1 (*b*), *S.* 49. (*A. I. R.* 1924 *Lah.* 337 **overruled.**)

Where the buyer had paid earnest money over Rs. 100 under a written agreement and so far from refusing to accept delivery, was pressing for specific performance.

Held : that the agreement did in itself create an interest under T. P. Act, S. 55 (b) and therefore did not allow of the application of S. 17 (2) (v). The agreement was therefore compulsorily registrable under S. 17 and, not having been registered, was inadmissible in evidence under S. 49. *A. I. R.* 1924 Lah. 337 **overruled.**

[P. 96, C. 1]

E. B. Raikes—for Appellant.

Respondent ex-parte.

Viscount Dunedin.— On the 2nd March, 1919, Dayal Singh the defendant-appellant executed an agreement with Indar Singh, now deceased, but represented by the plaintiff-respondent. This agreement had for its object the undertaking of a sale of certain property, and its terms, so far as material, are as follows :—

"I, Dayal Singh, son of Jiwan Singh, caste Jat Garewal, resident and Lambardar of Chak No. 1157, Upper Chenab, Tahsil Jaranwala, District Lyallpur, do here declare as follows :—

* * * * *

(here follows a description of the subject)

* * * * *

I have agreed to sell the above-mentioned property for Rs. 10,000 and the sum of interest to be paid to the Government to Indar Singh, son of Hira Singh, Havildar, caste Jat Dhami, occupation cultivation, abadkar and resident of Chak No. 188, Rakh Branch, Tahsil Lyallpur, who has agreed to purchase this land merely for the sake of Lambardarship. Out of the sale money I have at present received 1,000 by way of earnest money. Rs. 9,000 is agreed to be received before the Sub-Registrar, Lyallpur at the time of the completion of the sale and registration. The expenses, incurred in connexion with the execution and completion of the sale-deed, shall be borne by the vendee and myself in equal halves. I shall complete the sale in favour of the vendee within forty days, i. e., before the 1st Baisakh Sambat 1976, after making a settlement of the sum of interest (which shall be deposited by the vendee) with the Government. The vendee has been put in possession of the land sold. If I do not complete the sale, I shall pay Rs. 2,000 by way of damages to the vendee without any demur, and, besides, he shall be at liberty to have the sale completed by seeking legal remedy. As regards the filing of the interest, an application shall be made to the Deputy Commissioner of Lyallpur, and, on permission being granted. the vendee shall be made to deposit the said interest. If permission is not accorded the bargain of sale shall remain unaffected. The only agreement would then be that the sale would be completed after the interest was deposited. The land has, at any rate, been sold and the vendee has become entitled to it. I am simply entitled to receive Rs. 9,000. I have therefore executed this agreement in favour of Indar Singh, vendee, so that it may serve as an authority. I have secured an agreement to the same effect from Indar Singh, vendee.

This document was not registered, The appellant having refused to complete the purchase, the respondent succeeding to all rights of Indar Singh, deceased, raised this action for specific performance. The appellant pleaded that the document in question being a document which needed to be registered, and not having been registered, could not be received in evidence in terms of S. 49 of Act 16 of 1908. He also pleaded that in respect of undue influence exercised at the time of the making of the agreement, specific performance should be refused. The trial Judge held that the document did not require to be registered, but held that undue influence had been proved. On appeal the appeal Court agreed with the trial Judge that the document did not require to be registered, but disagreed as to the other matter. They therefore decreed specific performance.

The sole question in this appeal, which is ex parte, is, therefore, whether the document in question required to be registered. As the question is an important one, it will be well to trace the history of the legislation which bears on the point. Act XX of 1866, S. 17, made compulsorily registrable certain instruments :—

* * * * *

17.—(2) Instruments (other than an instrument of gift) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent, of the value of one hundred rupees and upwards to or in immovable property.

(3) "Instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment limitation or extinction of any such right, title or interest.

* * * * *

And, by S. 49, declared that no instrument required by S. 17 to be registered should be received in evidence in any civil proceeding in any Court unless it had been registered. The result of that enactment may be appreciated by a perusal of the case of *Futteh Chund Sahoo* v. *Leelumber Singh Doss* (1), where the Board characterized the case as a very hard one, but found that the terms of the Act were imperative. In 1877 (probably in accordance with the feeling as expressed above) in a new Act, S. 17 was repeated as before, but with this addition :

Nothing in Clauses (b) and (c) of this section applies to

* * * *

(h) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document, which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest.

This change having been made, there came to be raised questions as to various agreements ; first as to whether they fell under S. 17 (b), and, accordingly, if they did so, whether they could be excused in respect of S. 17 (h). Examples of such cases may be faund in *Burjorji Cursetji Panthaki* v. *Muncherji Kuverji* (2) where

(1) [1871] 14 M. I. A. 129=16 W. R. 26=9 B. L. R. 433=2 Suther 467=2 Sar. 709 (P. C.).
(2) [1880] 5 Bom. 143.

it was held that the agreement was not necessarily registrable, and *Ramasami* v. *Ramasami* *I. L. R.* 5 *Mad*, 115, where the agreement was held to be compulsorily registrable, and consequently not admissible in evidence. Their Lordships do not think it necessary to review these cases or to decide whether one of them will agree with what was said by Lord Buckmaster in *Rani Hemanta Kumari Debi* v. *Midnapur Zamindari Company Limited* (3). They will assume without deciding that taking the terms of Act of 1877 (alone the terms of which were repeated *totidem verbis*, though not with the same numbering of the paragraphs, in the Act of 1908, which is the Act which rules this case) the judgment of the Courts below were right in holding that the present agreement was an agreement to sell and not a sale, and was consequently exempted under S. 17 (2) (v.), which corresponds with S. 17 (h) of 1877. But there is another Act to be reckoned with which unfortunately entirely escaped the notice of the Courts below, as they say nothing about it; that is the Transfer of Property Act, 1882 (Act 4 of 1882) (passed, it will be observed, after the case of *Panthaki* (supra), which was in 1880). By S. 55 (b) the buyer is entitled:

> Unless he has improperly declined to accept delivery of the property, as against the seller and all persons claiming under him with notice of the payment, to the extent of the seller's interest in the property, for the amount of any purchase money properly paid by the buyer in anticipation of the delivery, and for interest on such amount; and when he properly declines to accept the delivery, also for the earnest (if any) and for the costs, if any, awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

Their Lordships are of opinion that the section applied to the agreement in this case, where the buyer had paid earnest money, and so, far from refusing to accept delivery, was pressing for specific performance, and that the agreement did in itself create an interest and therefore did not allow of the application of S.17 (2) (v).It was therefore, compulsorily registrable under S. 17 and, not having been registered, was inadmissible in evidence under S. 49.

Their Lordships will, therefore, humbly advise His Majesty to allow the appeal and to dismiss the suit, The appellant will have his costs before this Board; but the costs in the Courts will remain as ordered by the High Court.

Appeal allowed.

Solicitors for Appellant—*T. L. Wilson & Co.*

(3) [1920] 47 Cal. 485=53 I. C. 534=46 I. A. 240 (P. C.).

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* * A. I. R. 1926 Privy Council 96

(*From Calcutta*)

18th June 1926

VISCOUNL HALDANE, LORD DARLING AND MR. AMEER ALI.

Annada Prashad Das—Appellant.

v.

Ambica Prashad Das and *another*—Respondents.

Privy Council Appeal No. 182 of 1924 and Bengal Appeal No. 99 of 1923.

* * *Hindu Law—Maintenance — Right of residence in a house given by will of husband is to the house exclusively and no heir is entitled to any interest in the house during widow's lifetime.*

Where the Will by a Hindu testator provided: "My elder wife shall have the right of residence for the term of her natural life in the three-storeyed portion of my house No. 35, Ram Kamal Mukherji's Street."

Held; that the gift to the widow was for her life and the title of the widow was to occupy the whole of the three-storied portion of the house and that no question arose as to any other right of a widow to have a residence provided for her under the general Hindu Law.

Under the Hindu Law, unlike the law of England, there is no question of splitting up the fee simple and of creating a freehold estate for life. A nearer analogy is the law of Scotland, under which, as under the Indian Law, the fee is not permitted to be split up, but a burden is created which confers a full life interest.

[P 97 C 1 & 2]

Kenworthy Brown—for Appellant.

L. DeGruyther and *E. B. Raikes*—for Respondents.

Viscount Haldane.—This is an appeal from a decree of the High Court at Calcutta, dated the 29th June 1923, which reversed a decree of the Subordinate Judge of the 24 Parganas, dated the 2nd February 1921, who dismissed the suit. The question was whether the appellant had acquired a title to certain property by adverse possession. The property consists of what has been called the three-storied portion of a house in Ram Kamal Mukherjee's Street in Calcutta. The house belonged

to one Digambar Das, who died in 1888, leaving a will. The appellant is his eldest son, the first respondent is his younger son, and the second respondent is the appellant's mother. The question is: What was the state of the title under the will? The relevant words are these :—

My elder wife shall have the right of residence for the term of her natural life in the three-storied portion and my younger wife in the two-storied portion of my house No. 35, Ram Kamal Mukherjee's Street. I direct my executor to pay into the hands of the said Shama Churn Bose the sum of 3,000 Rupees to complete the unfinished portions of the three-storied portion of my said house No. 35, Ram Kamal Mukherjee's Street.

What happened was that in 1898 there was a partition suit instituted in the High Court by the appellant, in which a decree was passed allotting to him the three-storied portion of the house, subject to the right of residence of his mother during her life. In 1899 the right, title and interest of the appellant in the three-storied portion of the house was sold in execution of a decree and purchased by one Prince Kumar Kader Meerza. The purchase was expressed to be subject to the right of residence of the widow. Before and ever since the sale, the widow has been residing in the three-storied portion of the house, and there has been no attempt to evict her or to enter into occupation by the purchaser. On the 14th September 1917, the purchaser resold to the respondent, the younger half-brother of the appellant. Then the suit was brought, the basis of the claim being that ever since the purchase by Prince Kumar Kader Meerza, the appellant had been in possession of the house adversely to the purchaser and had thus acquired a complete title before the purchase by the respondent, which was more than twelve years later.

The Subordinate Judge thought that all the widow took under the will was a Hindu widow's right of residence in the part allotted to her and that, therefore, the purchaser had the right to live in the three-storied portion of the house with her, and that, if the appellant lived there, the title of the purchaser was extinguished before he resold to the respondent; but the High Court took a different view. They said that the question was one simply of the construction of this Hindu will, and the learned Judges, Mr. Justice Mookerjee and Mr. Justice Rankin, decided that the gift to the widow was for her life and the title of the widow was to occupy the whole of the three-storied portion of the house and that no question arose as to any other right of a widow to have a residence provided for her under the general Hindu law. What there really is, is a gift which indicates the intention of the testator to allow his widow to occupy the whole of the three-storied portion of the house as her exclusive residence. Under the Hindu law, unlike the law of this country, there is no question of splitting up the fee simple and of creating a freehold estate for life. A nearer analogy is the law of Scotland, under which, as under the Indian law, the fee is not permitted to be split up, but a burden is created which confers a full life interest. Here what the learned Judges have held is that as a matter of intention this widow was entitled to reside in the house and reside in it exclusively. That is very definitely stated in the judgment.

In these circumstances their Lordships think that the words of the document are such as to justify the conclusion arrived at by the two Judges in the High Court, and did not justify the conclusion arrived at by the Subordinate Judge. They will, therefore, humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for Appellant — *Theodore Bell & Co.*

Solicitors for Respondents — *Watkins & Hunter.*

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* A. I. R. 1926 Privy Council 97

(*From Oudh*)

1st July 1926

VISCOUNT DUNEDIN, LORD ATKINSON AND MR. AMEER ALI.

Rawat Sheo Bahadur Singh — Appellant.

v.

Beni Bahadur Singh—Respondent.

Privy Council Appeal No. 14 of 1923, and Oudh Appeal No. 24 of 1919.

✲ (*a*) *Hindu Law — Adoption — Power to adopt need not be exercised at once.*

Under the Hindu Law, when power is given to the widow to adopt, there is no obligation on her part to make the adoption at once. It is well known that it takes time and trouble to select a suitable boy. Horoscopes have to be consulted and the opinions of Laudets taken. [P 99 C 2]

✲ (*b*) *Practice—Judgment.*

Discussion about speculative theories built on medical books without any facts established by the evidence in the case was condemned : 23 *Cal.* 1 (*P. C.*), *Appr.* [P 100 C 1]

L. De Gruyther and *B. Dube*—for Appellant.

George Lowndes and *E. B. Raikes*—for Respondent.

Mr. Ameer Ali.—The parties to this litigation are Hindus subject to the Law of the Mitakshara. Under this law the widow is entitled to adopt a son to her deceased husband provided he has left her permission for that purpose.

The suit in this case relates to the validity of the alleged adoption of the defendant by a Hindu lady of the name of Mt. Sukhraj Kuar. There is no question that in 1913 she made the adoption. The only question is whether her husband Jageshar Baksh Singh, a man of substance and position in the Rae Bareli District of the United Provinces in India, had left her permission to adopt a son to him. Jageshar Bakhsh Singh died in December 1907. He had been suffering from diabetes for some years. In the early part of 1907 he is said to have had a paralytic stroke. It is the case of the defendant that Jageshar Bakhsh Singh got over his attack and was quite able to move about and look after his work ; and that in July 1907, he wrote out a Will in his own handwriting, to which he obtained the attestation of two persons, one being Lalta Prashad, who was ziladar in charge of his estate ; the other, Bans Bahadur, another employee. It is also alleged, on the defendant's behalf, that soon after the attestation of these two persons, Jageshar Bakhsh Singh went to a friend, a taluqdar of position named Mujib Haidar Khan, and got him also to attest the Will. The plaintiff, Sheo Bahadur Singh, charges the will to have been fabricated after Jageshar's death. If this contention be right, his widow Sukhraj would have no power to adopt.

Apparently the defendant was about 5 years of age when he was adopted, and when this suit was instituted in 1915, he must have been only seven. A guardian ad litem was appointed for him by the Court, and the suit is being defended on his behalf by the guardian.

As already stated, Sheo Bahadur Singh, the plaintiff, questions the validity of the adoption and denies the authenticity of the Will. The defendant in his written statement, set out the facts connected with the execution of the Will and his own adoption. A replication was filed by the plaintiff in answer to the facts alleged in the written statement. On the evidence in the case it is fully established that the plaintiff and the other agnatic relations of Jageshar Bakhsh Singh lived in the same village or township, Panhona, where Jageshar Bakhsh Singh lived, and where he died, and where his widow, Sukhraj Kuar, resided until her death ; and although the plaintiff says in his evidence that during Jageshar Bakhsh Singh's illness from paralysis he frequently visited him, no mention was made in the replication about his total incapacity urged in the later stages of the proceedings to write or to do the acts alleged in the written statement.

The case went to trial before the Subordinate Judge of Rae Bareli. The plaintiff examined a certain number of witnesses to establish his relationship to the deceased. The case for the defendant was opened some time in June 1916, and on his side a number of witnesses were examined to establish the fact that the Will was written and signed by Jageshar Bakhsh Singh, and was duly witnessed by the witnesses whose names are borne on the document. The Subordinate Judge believed the witnesses for the defendant, and considered that the plaintiff and his witnesses gave false testimony in the case, and accordingly dismissed the suit.

On appeal before the Court of the Judicial Commissioner of Oudh, there was a difference of opinion. The First Judicial Commissioner, Mr. Kanhaiya Lal, was of opinion that there was considerable suspicion attached to the execution of the document in question, and held that its execution by Jageshar Bakhsh Singh was not sufficiently proved. He accordingly held that the claim of the plaintiff should succeed. The Second Judicial Commissioner, Mr. Daniels, was

of a different opinion, and agreed with the Subordinate Judge that the plaintiff's case was false, that the execution of the Will was conclusively proved, and that the suit should be dismissed. A decree was accordingly made dismissing the claim.

The plaintiff has appealed from this order to His Majesty in Council, and the arguments urged before the Subordinate Judge and in the Court of the Judicial Commissioner have been repeated before their Lordships.

They desire to observe at the very outset of their judgment what they have already mentioned, that the plaintiff and most of the agnatic relations of Jageshar Bakhsh Singh, if not all, who are more or less interested in the subject of the Will in dispute, live in the same village, not far from the residence of the deceased and his wife Sukhraj. Sheo Bahadur, the plaintiff, states in his evidence that his house is about "two furlongs" from Sukhraj's house. He says further that he frequently visited the deceased when he suffered from the paralytic stroke in 1907. It is, to say the least, extraordinary that he should have forborne to put in the forefront of his case the allegation that Jageshar, at the time when the Will is said to have been executed, was totally helpless and utterly incapable of executing the document.

As Mr. Daniels, the Second Judicial Commissioner, points out in his judgment, it was only at a very late stage of the case that the genuineness of the Will was questioned on the ground of the physical incapacity of the alleged testator. He says as follows :

> Even when the earlier witnesses of the respondent were examined there was no cross-examination as to the physical condition of the deceased, though these witnesses included Jag Prasad Vaid, the regular medical attendant of the deceased. At this point there was an interval of three months in the hearing of the case owing possibly to the Subordinate Judge's transfer, and it was not until July, 1916, that any serious intention to challenge the testator's physical capacity to execute the Will was disclosed. The appellant replies to this that he had not seen the Will and did not know that it purported to be in the testator's own hand. The Will had been filed in the mutation proceedings consequent of Sukhraj Kuar's death, the adverse order in which was the immediate occasion for the present suit ; and though it is true that neither the appellant nor his pleader was in Court on the date on which the Will was filed, it seems highly unlikely that he should have launched a suit of this importance without having taken some opportunity of seeing it or ascertaining its nature and contents.

The Subordinate Judge appears to their Lordships to be perfectly right in his observation that the challenge of Jageshar Bakhsh Singh's capacity to write the document or to put his signature to it was an afterthought. As both the trial Judge and the Judicial Commissioner have observed, the Will is a natural Will. Jageshar Bakhsh Singh was a Hindu ; he had the natural desire that he should have male progeny to duly perform the oblations necessary for his salvation in after-life. The document in dispute is couched in simple language written in the script with which he was familiar. It is not a complicated document, and the testamentary directions are simple and direct, such as a Hindu gentleman of substance would express. In the alleged Will the testator recites that he was 54 or 55 years of age and had no hope of having issue of his own, and was, therefore, desirous of adopting a son ; that he devised his property to his widow, Sukhraj, and gave her authority to adopt a son to him for the performance of the spiritual duties which would conduce to his benefit in the next world, and that the son was to take the estate after Sukhraj's death. Their Lordships do not see that there is anything improbable in the wishes Jageshar Bakhsh Singh is alleged to have embodied in this document.

Starting with this probability, their Lordships desire to examine the evidence for themselves. (The judgment after discussing evidence proceeded.) Their Lordships consider that the affirmative evidence regarding the capacity of Jageshar to write the Will and its due execution and attestation is overwhelming.

Some point was made on the delay on the part of Sukhraj Kuar in making the adoption. Under the Hindu Law when power is given to the widow to adopt there is no obligation on her part to make the adoption at once. It is well known that it takes time and trouble to select a suitable boy. Horoscopes have to be consulted and the opinions of Laudets taken. There is nothing in this case to show that there was any undue delay in making the adoption, if delay can, under the law, be taken into consideration.

A great deal of time appears to have been taken up in the Courts in India by speculative theories built on medical books without any facts 'established by the evidence in the case' to use Lord Watson's condemnation in the case of *Sajid Ali* v. *Ibad Ali* (1).

Before the Board, counsel very wisely abstained from the course which was reprehended in the judgment just cited. Their Lordships refer to it in order to help the Indian Courts to economize time in the trial of similar cases.

On the whole, their Lordships are of opinion that the judgment of the Subordinate Judge, affirmed by the Second Judicial Commissioner, is right, and they will accordingly humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for Appellant.—*T. L. Wilson & Co.*

Solicitors for Respondent.—*Watkinson & Hunter.*

(1) [1896] 23 Cal. 1=22 I.A. 171=6 Sar. 627 (P.C.).

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* A. I. R. 1926 Privy Council 100

(*From Oudh*)

1st July 1926.

VISCOUNT DUNEDIN,

LORD ATKINSON AND MR. AMEER ALI.

(*Thakur*) *Nirman Singh* and *others*—Appellants.

v.

Thakur Lal Rudra Partab Narain Singh and *others*—Respondents.

Privy Council Appeal No. 23 of 1924 and Oudh Appeal No. 14 of 1922.

* *Mutation—Mutation proceeding is not a judicial proceeding and does not decide title and is no evidence of exclusion from property—Adverse possession—Limitation Act, Art.* 127 *—Cosharer.*

It is an error to suppose that the proceedings for the mutation of names are judicial proceedings in which the title to and the proprietary rights in immovable property are determined. They are nothing of the kind, as has been pointed out times innumerable by the Judicial Committee. They are much more in the nature of fiscal inquiries instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of certain denominations of immovable property may be put into occupation of it with greater confidence that the revenue for it will be paid.

[P. 103, C. 2]

Orders in mutation proceedings are not evidence that the successful applicant was in possession as sole legal owner in a proprietary sense, to the exclusion, for example, of all claims of the other members of the family as co-owners or for maintenance or otherwise, as revenue authorities have no jurisdiction to pronouce upon the validity of such a claim.

[P. 104. C. 1]

A. M. Dunne and *B. Dube*—for Appellants

Respondent—Ex-parte.

Lord Atkinson.—This is an appeal from a judgment and decree dated the 18th September, 1922, of the Court of the Judicial Commissioner of Oudh which reversed a judgment and decree dated the 6th July 1920, of the Subordinate Judge of Jahraich. The main question for determination on this appeal is whether the plaintiff's suit is barred by limitation. The Subordinate Judge held that it is not barred, and the appellate Court took the opposite view, holding that it was barred. The pedigree of the parties showing their descent from Lalta Singh, who died in the year 1882, the relation between them, and the position they have respectively taken up in the litigation out of which this appeal has arisen, are indicated with sufficient fullness and accuracy in the pedigree as set out in the appellants' case.

It runs as follows :-

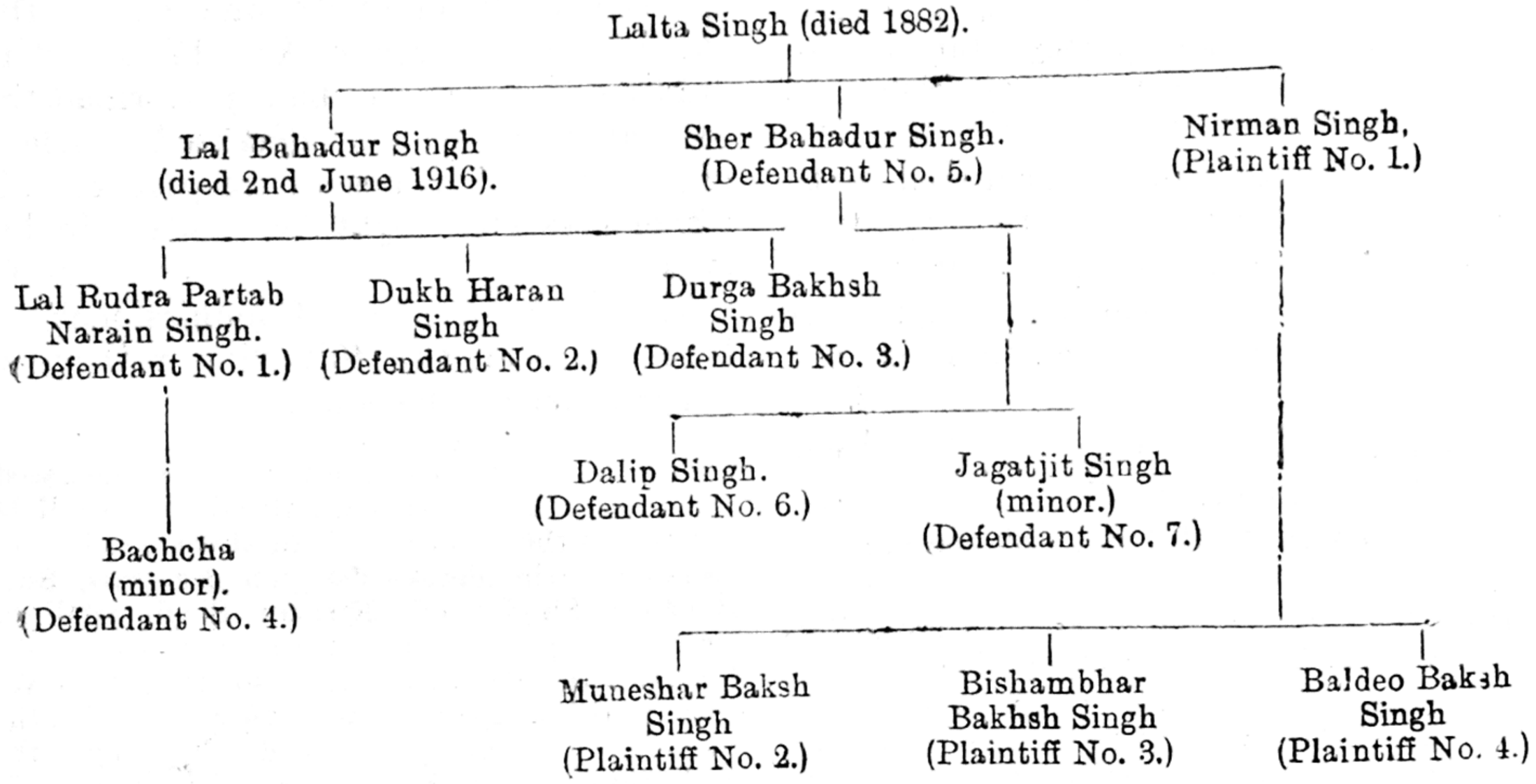
(See p. 101 for pedigree.)

The pedigree of the ancestors of Lalta Singh is fully printed at page 29 of the Record.

The plaintiffs, Nirman Singh, Muneshar Bakhsh Singh, Bishambhar Bakhsh Singh and Baldeo Bakhsh Singh, commenced an action against the three sons of Lal Bahadur Singh, since deceased, who died on the 2nd June, 1916, and Bachcha, then 10 years of age, then a minor under the guardianship of his own father, Sher Bahadur Singh, and Dalip Singh. A paragraph of the plaint filed by the plaintiffs sets forth that the parties to the suit are members of a joint Hindu family, governed by Mitakshara Law, and that no partition of any kind has ever been effected between the parties to the suit, or between the ancestors mentioned in their pedigree. In paragraph 3 it stated that Lalta Singh's own brothers died childless ; that Lalta Singh thereupon became head of the joint Hindu family and entered into possession of the entire joint property ; that at the time of the death of Lalta Singh, Nirman Singh, plaintiff

No. 1, and his brother, Sher Bahadur Singh, were minors and lived with their elder brother, Lal Bahadur Singh ; that all the villages held in proprietary possession remained joint property ; that mutation of names being effected in favour of Lal Bahadur Singh, as the head of this joint Hindu family, during whose life all the members of the family remained as owners in respect of the joint family property ; Lal Bahadur Singh died on the 2nd June, 1916. It was then stated that defendants from 1 to 4 then raised all sorts of disputes and filed objections against the mutation of names, rendering it impossible to live in joint enjoyment of the family property ; that, for this reason, plaintiff then desired this property should be partitioned amongst the members of the family, but on the 27th November 1916, Defendant No. 1 finally refused to consent to this being done. The share of the plaintiffs in the entire property would, on partition, be one-third, that of Defendents Nos. 1 to 4 (also one-third) and that of the Defendants 5 to 7 also one-third.

Defendant No. 5 and his two sons, Defendants Nos. 6 and 7, are impleaded as defendants, but in their written statement they admit the validity of the plaintiffs' claim. The principal defendant is Lal Rudra Partab Narain Singh, Defendant No. 1. He filed a written statement on the 3rd November 1917, about 18 months after the death of his father. In his statement he denied that the parties to the suit were ever members of a joint Hindu family, and in paragraphs 15 and 16 of this statement averred that the custom of single ownership had been existing for centuries in the family of Lal Rudra Partab Narain Singh, Defendant No. 1, and that the Bahraich estate since its acquisition had for generation after generation been held by a single owner, that under this custom the property was impartible and owned by a single owner. That the estate was never partitioned in view of the fact that it was impartible, and further that the custom of primogeniture has obtained in the family of Defendant No. 1 and that for generation after generation the Bahraich estate had been held and enjoyed by the eldest son in accordance with this custom, while the other children continued to get only maintenance allowance due by way of guzara in accordance with the custom.



He further averred that Bahadur Lal Singh, his father, had been in exclusive possession of the estate in dispute from May 1882, and that even if the plaintiffs had any right to partition, limitation commenced from the date of mutation in 1882 and their claim was barred by time. Defendants 3 and 4 adopted as their own the pleas raised by Defendant No. 1.

On these pleadings, the Subordinate Judge framed 20 issues (see page 376 of the record, numbered from 1 to 20 both inclusive.) He has most conveniently divided them into three groups according to the subjects with which they respectively deal.

The first group consists of the following first two issues :

(1) Whether Lal Bahadur Singh and the parties to the suit constitute members of a joint Hindu family ?

(2) Whether the property in suit is joint family property ?

The Subordinate Judge, after having most carefully examined all the evidence, found in the affirmative on each of these issues, and the appellate Court affirmed his findings.

The second group has comprised the two following issues, Nos. 3 and 4 :

(3) Does a custom of impartibility and of succession by lineal primogeniture exist in the family, as alleged ?

4. Is the property in the suit also otherwise impartible as alleged ?

The Subordinate Judge found these issues against the defendants and expressed himself thus :

Now all the points to be determined in connexion with Issue No. 3 have been wholly or partly decided in the negative upon a review of all the authorities cited for the parties and the documentary and oral evidence in the case. I am therefore of opinion that the custom of impartibiiity and lineal primogeniture pleaded by the contesting defendant is not established, and I find Issues Nos. 3 and 4 in the negative.

The appellate Court concurred with the finding of the Subordinate Judge that the defendants had failed to prove the custom pleaded by them, saying: "Our finding is that the custom is not proved."

The third group consist of the Issues Nos. 10, 11 and 12, relating to the raising the plea of limitation. These run as follows :

(10) Have the plaintiffs been in possession of the property in suit within limitation ?

(11) Have Lal Bahadur Singh and Defendant No. 1 been in adverse possession of the property in suit for more than twelve years before suit ?

(12) If the property in suit be found to be joint family property, then have the plaintiffs been excluded within their knowledge from the enjoyment of it more than twelve years before suit ?

The lower Courts are agreed in holding that the determination of the question of limitation depends upon the true meaning and application of Article 127 of the 1st Schedule to the Indian Limitation Act 9 of 1908, which is as follows :

Description of Suit.	Period of Limitation.	Time from whieh period begins to run.
127. Suit by a person excluded from joint family property, to enforce a right to share therein.	Twelve years.	Whenthe the exclusion becomes known to the plaintiff.

The Subordinate Judge tried Issues Nos. 10, 11 and 12 together, and, on considering them, he directed his mind tothe following considerations :

In order to see whether the suit is or not barred under Article 127, we have to see whether or not the plaintiffs were excluded from the joint family property more than twelve years before the suit to their own knowledge. The onus of proving not only that they were excluded, but also that they knew that they were excluded more than twelve years before the suit, i.e , before the 6th July, 1905, lay upon the contesting detendants.

The facts relating to the plea of limitation may be summarized thus :

As already stated, the head of the joint family, Lalta Singh, died in 1882, leaving him surviving three sons, namely: (1) the eldest, Lal Bahadur Singh ; (2) the second, Sher Bahadur Singh (Defendant No. 5), who was sixteen years old ; and (3) the plaintiff, Nirman Singh, who was a minor, fifteen years of age.

On the 23rd May 1882, the said Lal Bahadur Singh filed an application under the provisions of Ss. 61 and 62 of the Oudh Land Revenue Act 17 of 1876, praying that, as he had performed the funeral rites of his deceased father, mutation of names in respect of his father's estate might be made in his favour.

The Extra Assistant Commissioner of Bahraich made the following rather peculiar order on the application :

"Ordered

that in place of the name of Lalta Singh, deceased, the name of his eldest son, Lal Bahadur. shall be written in the column of lambardar and the names of (the deceased's) younger sons, Sher Bahadur Singh and Nirman Singh shall be written in place of the deceased as cosharers. Let the Tahsildar be informed so that he gives effect to this and collects the usual fee. Let the Registrar Qanungo, the Suddar Qanungo, the vasilbaqi navis of the Suddar be informed. If this eldest son, Lal Bahadur, has any objection to the recording of the names of his brothers as cosharers, and considers them to be entitled to maintenance, he can have his remedy from a competent Court, as according to Hindu Law and custom all the sons of a deceased person are his lawful representatives.

(Sd.) Pandit Janki Prasad

"Extra Assistant Commissioner of Bahraich. Dated 1st June, 1882."

Lal Bahadur was dissatisfied with this order and appealed to the Deputy Commissioner of Bahraich, who made an order equally peculiar. It runs thus :

"Order.

Such being the facts of the case I accept the appeal from the order of the Extra Assistant Commissioner and cancel so much of his order as not register (sic) Sher Bahadur and Nirman

Singh in the Tahsil books as properties in possession. This order will not, of course, debar them from claiming, should at any time such a course appear to either of them advisable, their share in the estate.

To-day present appiicant and the two minors. Their mother and guardian is not present. Sher Bahadur and Nirman Singh, aged 16 and 15, appear with an application from their mother excusing her appearance at such a distance (35 m.) in this weather, she being a pardahnashin. She says in it that the estate has never been divided, and that she has no objection to dakhilkharij in the eldest boy's name, Lal Bahadur's.

Sher Bahadur, aged 16 declares that the signature to this is his mother's, and was written by her in his presence.

(Sd). M. L. Ferrar,
Deputy Commissioner.

Both the lower Courts have found that the plaintiff, Nirman Singh, and his brother, Sher Bahadur Singh, have, since their father's death in the year 1882, lived jointly with their eldest brother Lal Bahadur Singh in the ordinary way, and continued so to do up to the year 1911, or thereabouts. Thereafter they resided separately, but received considerable sums of money for their expenses from Lal Bahadur Singh, the head of the joint family. The defendants themselves assert that plaintiffs are in receipt of cash maintenance, and that they are in possession of some land in lieu of the same. In view of these facts, the Subordinate Judge held that the plaintiff's suit was not barred by limitation, and concluded a sound and able judgment in the following words :

The last-mentioned case of *Raghunath Bali* v. *Maharaj Bali* (1), makes it clear that even where the person actually holding the property of a joint family believes that it is impartible property and another member of the family sharing that belief accepts maintenance, it does not amount to the exclusion of the latter, and upholds the authority of the Privy Council in 20 *Madras*, 256, that where the junior member under a mistake accepts the provision of maintenance they are not to be deemed excluded as coparceners. The mere fact that the parties believed that the estate was impartible and the junior coparceners having a right to share accepted maintenance in lieu, does not put the head of the family in a position adverse to the other members, so as to force them to realize, so to speak, their right of partition or be barred. The cause of action would not arise unless the coparcener is absolutely excluded, and is not absolutely excluded if he is in receipt of maintenance from the family property. Here it is asserted by the contesting defendants themselves that the plaintiffs are in receipt of cash maintenance, and that they are in possession of some lands in lieu of the same (Vide Ex. A142 to A160, A177 and A178.)

(1) [1885] 11 Cal. 777=12 I. A. 112=4 Sar. 642 (P. C.).

The decision of the Madras High Court in *Jagannatha* v. *Rambhadra* (2), confirmed by the Privy Council in *Jagannatha Razu* v. *Rambhadra* (3), laid down that if the plaintiff in a suit under Article 127 has lived on the property with other joint owners, and has been supported by the proceeds of the joint family property, this is sufficient to negative his exclusion and to save limitation.

Exclusion to bar a suit under Article 127 must be a total exclusion (Vide *Lakshmi Devi* v. *Dhatrazu* (4), *K. K. T. Udayar* v. *V. K. K. T. Udayar* (5) and *Kumarappa Chettiar* v. *Swaminatha Chettiar* (6).

In view of these authorities and the facts of the case, I am of opinion that the plaintiffs have not been excluded within their knowledge from the suit and that it is within time. I, therefore, find the issue accordingly against the contesting defendants.

The perusal by their Lordships of the judgment of the Court of the Judicial Commissioner of Oudh, at page 482 of the record, leads their Lordships to think that its judgment is to a great degree based on the mischievous but persistent error that the proceedings for the mutation of names is a judicial proceeding, in which the title to and the proprietary rights in immovable property are determined. They are nothing of the kind as has been pointed out times innumerable by the Judicial Committee. They are much more in the nature of fiscal inquiries instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of certain denominations of immovable property may be put into occupation of it with greater confidence that the revenue for it will be paid.

It is little less than a travesty of judicial proceeding to regard the two orders of the Extra Commissioner of Bahraich and Mr. M. L. Ferrar, Deputy Commissioner, as judicial determinations expelling proprio vigore any individual from any proprietary right or interest he claims in immovable property. Yet of these very orders the Court of appeal at p. 484 of the record said the Deputy Commissioner decided that Lal Bahadur Singh was alone entitled on the evidence to have his name entered, though he added that his order could not debar the brothers.

(2) [1888] 11 Mad. 380.
(3) [1891] 14 Mad. 237=18 I. A. 45=5 Sar. 645 (P.C.).
(4) [1897] 20 Mad. 256=24 I. A. 118=7 Sar 185.
(5) [1901] 24 Mad. 562.
(6) [1919] 42 Mad. 431=36 M. L. J. 612=52 I. C. 470=(1919) M. W. N. 328.

from bringing a suit to establish their claim at any time.

It appears to us that these proceedings afford clear evidence that Lal Bahadur Singh took possession of the estate as property to which he was entitled to exclusive ownership, and not on behalf of the younger brothers. There can be no doubt he had sole physical possession in the sense that he was able to deal with the proceeds and to exclude all others, and there can be no doubt that he showed a determination to exercise that physical power on his own behalf. He had therefore sole legal possession—yes, in the sense that any person who on an application for mutation of names is put upon the registry as sole occupier will have sole legal possession, whether he be the head of a joint Hindu family, or not head of any family, or an absolute owner. If, however, the Court of appeal meant by the language they have used that these orders were evidence that Lal Bahadur Singh was in possession as sole legal owner in a proprietary sense, to the exclusion of all claims of the other members of the family as co-owners or for maintenance or otherwise, they, in their Lordships' view, were entirely mistaken. The same evidence finds expression in this passage of the judgment of the Court of appeal as is manifested in the passage at the top of page 485. After referring to what Lord Macnaghten, in the case of *Corea* v. *Appuhamy* (7), said to the effect that "possession is never considered adverse if it can be referred to a lawful title," they held that there was nothing in that case to show any intention on the part of the deceased owner's heir to enter as a plunderer, and said that case is to be distinguished from the present case by the fact that Lal Bahadur Singh did at the time of entry set up an adverse title in clear terms before the revenue authorities, and they accepted his claim. If that means that Lal Bahadur Singh set up a claim to be sole proprietary owner of this estate, entitled to an interest in which his brothers had no claim, then these revenue authorities had no jurisdiction to pronounce upon the validity of such a claim, and from these orders it would appear they did not attempt to do so. It is, in their Lordships' view, perfectly clear that the orders already referred to did not effect and were not intended or designed to effect proprio vigore an exclusion of the plaintiffs from all interest in the property of the joint family of which they were members. At page 487 the Court of appeal deals with the point of exclusion. They say it was strenuously argued that the fact that Lal Bahadur Singh's brothers got maintenance and actually held some lands is conclusive proof that they were not, in point of fact, excluded from the estates of Lal Bahadur. A long and rather obscure discussion follows as to the exclusion being intentional or the contrary. It is generally understood in law that a man must be presumed to intend the natural consequence of his own act. The following passage on page 487, between lines 20 and 30, is the strongest practical comment upon this principle. It runs thus:

> It must be possible to infer that it was accompanied by an intention to abandon the position of a right to exclude. No doubt such intention will be inferred where no legal title to exclude is proved to have been set up and maintained, because there is always a presumption in favour of rightful entry and retention. Such presumption is, however, rebuttable. Here the facts are these. Lal Bahadur Singh was, as we have found, a co-sharer in point of law. But he was holding under an express assertion of his title to hold as sole proprietor. He gave money and lands to his brothers in the way a sole proprietor would do. Such gifts do not save his brothers from exclusion. The cases cited to us appear to us no authority for the contrary.

On the whole their Lordships are quite unable to concur with the Court of appeal in the views that Court has taken on all or most of the important points in this case. They think those views are erroneous. The judgment of the Subordinate Judge they, on the contrary, think sound and helpful, and are therefore of opinion that the decision of the Court of appeal should be set aside, that the judgment and decree of the Subordinate Judge should be affirmed, and this appeal should be allowed with costs, and they will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors for Appellants.—*H. S. L. Polak.*

(7) [1912] A. C. 230=81 L. J. (P. C.) 151=105 L. T. 836.

* * A. I. R. 1926 Privy Council 105

(*From Allahabad*)

22nd June 1926.

LORDS BLANESBURGH, DARLING, SIR JOHN EDGE, MR. AMEER ALI AND LORD SALVESEN.

Masit-Ullah and *others*—Appellants.

v.

Damodar Prasad—Respondent.

Privy Council Appeal No. 28 of 1925, and Allahabad Appeal No. 26 of 1922.

* * *Hindu Law—Joint family—Even great-grandson by birth acquires interest in joint family property and son, grandson and great-grandson are all liable for the debts of their ancestors to the extent of the assets received by them.*

It is beyond question that under the law of the Mitakshara the great-grandson is as much a member of the joint family as a son or grandson. It is also clear that the right in ancestral property extends to four generations beginning with the father, and that this right springs from "birth."

Under the law of the Mitakshara the rights of descendants are co-extensive with their obligations. Sons and grandsons are expressly declared to have controlling rights in respect of ancestral estate.

The Hindu lawyers appear to have made a difference in the obligations resting upon sons, grandsons and great-grandsons. The son was bound to discharge the ancestral debt as his own, principal and interest, whether he received any assets or not from the ancestor. The grandsons had to discharge the debt without interest and the great-grandson's liability arose only if he received any assets from the ancestor.

The British Indian Courts have held that the son and grandson are not liable for any debt unless they receive assets and that the obligations of each of them, sons and grandsons, are co-extensive. In the case of *Brij Narain* v. *Mangla Prasad*; *A. I. R.* 1924 *P. C.* 50=46 *All.* 95: the son's liability is expressly laid down, and that rule extends equally to grandsons and great-grandsons: 19 *All.* 26 (*F. B.*) *Expl.*

[P. 106, C. 2, P. 107, C. 2, P. 108, C. 1]

De Gruyther and *Majid*—for Appellants.

Respondent—Ex-parte.

Mr. Ameer Ali.—This appeal arises out of a suit brought by the plaintiff Damodar Prasad on the 19th September 1918, to set aside an alienation effected by his father Janki Prasad on the 17th September 1906. Damodar Prasad, the plaintiff, is a member of a Hindu family subject to the Mitakshara Law, and the allegations on which he seeks to have the sale by his father set aside are, in the common form, alleged immorality of the father, jointness of the family, and the absence of necessity for the sale, which is sought to be set aside. The plaintiff made his father Janki Prasad a defendant in the suit. Originally, he was Defendant No. 6, but, after the addition of the representatives of some of the vendees who had died in the meantime, Janki Prasad was made Defendant No. 11.

In his plaint the plaintiff prayed to be put in proprietary possession of the property in suit and for mesne profits. In their answer to the plaintiff's claim the defendants denied that the property was ancestral and they alleged that it was sold to them for Rs. 18,400, which was applied for family purposes, and that the alienation was valid in law and binding on the plaintiff.

The suit came for trial before the Subordidate Judge of Moradabad who, on the 25th February 1920, held inter alia that the plaintiff had failed to prove absolutely the allegations made by him against his father of immorality, he held also that it had been established that out of the Rs. 18,400 over Rs. 16,000 had been applied to the discharge of ancestral debts, the payment of which was binding on the joint family of which the plaintiff was a member. He held further that Janki Prasad, the grandson of Jawahir Lal who had contracted the debts that had been discharged out of the sale proceeds, was

> competent to transfer the family property to discharge his deceased grandfather's debts which were not proved in the case to have been taken for any immoral purposes.

He also held that Damodar Prasad, the great-grandson of Jawahir Lal, was burdened with the same obligation that lay upon Janki Prasad. But the Subordinate Judge found that, out of the consideration of Rs. 18,400 a sum of Rs. 2,000 odd was not properly accounted for, and that in respect of that amount the plaintiff was under no obligation. He found also that Janki Prasad, on the 9th July 1907, transferred his half-share in the family property to the plaintiff his son for a consideration of Rs. 40,000, and that, although the plaintiff was a minor at the time of this transfer, on attaining majority he ratified the transaction. The Subordinate Judge considered that this transfer had the effect of 'disrupting" the joint family and that after this transfer of

1907, the plaintiff and Janki Prasad could not be taken to be

> members of a joint Hindu family owning joint property in the true sense of the word in Hindu Law.

He accordingly held that the sale deed impugned in the case could not be set aside as the major portion of the consideration was used in the discharge of legal debts. The only relief the plaintiff was entitled to was to have "a proportionate property released from the sale deed and only to the extent of his share." He dismissed the claim for mesne profits considering that the claim was unduly delayed. He accordingly made a decree in the following terms :

> The plaintiff's claim is decreed for recovery of certain specified share in the property in suit.

The plaintiff appealed to the High Court of Allahabad. The learned Judges considered that the decree the Subordinate Judge had made was unworkable, and in this view their Lordships agree ; but the High Court took a totally different view regarding the liability of the plaintiff in respect of the ancestral debts, for which the property had been alienated by his father Janki Prasad, and principally, in this view of the case, the learned Judges came to the conclusion that Damodar Prasad was not liable for anything more than Rs. 3,077, which was actually left in the hands of the vendees for payment to certain creditors of Jawahir Lal, and which had been proved to have been paid to these men by the vendees. The High Court agreed with the Subordinate Judge in the conclusion that Janki Prasad's transfer of 1907 to his son effected a partition between them and they accordingly made the following order in the case :

> The result is that the plaintiff is entitled to a decree directing that he may recover possession of one-half of the property specified at the foot of the plaint, subject to payment into Court for the benefit of the defendant's vendees of a sum of Rs. 1,561-2-6. We allow him two months from the date of this decree to pay that money into Court. If he fails to do so, his suit will stand dismissed with costs throughout. If payment ie made as directed the plaintiff will be entitled to recover possession. In the view which we take regarding the nature of the suit as a whole, and its conduct in the Court below, with reference more particularly to the non-appearance of Janki Prasad in the witness box and the numerous indications on the record that the plaintiff and his father are really hand and glove in this matter, we do not think that we ought to allow the parties any costs. The parties will, therefore, bear their own costs in this Court and in the Court below. This decree will be substituted for the decree of the trial Court which is hereby set aside.

The defendants have appealed from the decree of the High Court to His Majesty in Council.

It is to be regretted that the respondent does not appear on this appeal. Their Lordships, however, have given their best consideration to the case and minutely examined the authorities.

The principal point for determination relates to the position of the great-grandson with regard to the obligation resting in a Mitakshara family on descendants to liquidate the debts of the ancestor.

It is beyond question that under the law of the Mitakshara the great-grandson is as much a member of the joint family as a son or grandson.

It is also clear that the right in ancestral property extends to four generations beginning with the father, and that this right springs from "birth" (the Mitakshara, Chapter I, verse 27 ; the Viramitrodaya (Shastri's Translation), pp. 16 and 72). Professor Sarbadhikari in his Lectures on Hindu Law, p. 563, points out that there is absolute consensus among the commentators on the subject of the great-grandson's interest in ancestral property.

Under the law of the Mitakshara the rights of descendants are co-extensive with their obligations. Sons and grandsons are expressly declared to have controlling rights in respect of ancestral estate. Vijnaneswara in Chapter I, S. 1, verse 27, declares as follows :

> Therefore it is a settled point, that property in the paternal or ancestral estate is by birth, although the father has independent power in the disposal of effects other than immovables, for indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress and so forth ; but he is subject to the control of his sons and the rest in regard to the immovable estate, whether acquired by himself or snherited from his father or other predecessor.

In S. 5, v. 9, the grandson is declared to have the same right as the son.

So likewise the grandson has a right of prohibition, if his unseparated father is making a donation, or a sale ot effects inherited from the grandfather ; but he has no right of interference if the effects were acquired by the father. On the contrary, he must acquiesce, because he is dependent.

Their Lordships will consider presently whether there is any difference in principle between the rights and obligations of grandsons and of great grandsons.

Mr. Mayne, in his valuable treatise on Hindu Law, has summarized the rules of the Mitakshara relating to the rights of sons and other descendants as follows :

The question in each case will be: 'Who are the prrsons who have taken an interest in the property by birth ?' The answer will be that they are the persons who offer the funeral cake to the owner of the property. That is to say, the three generations next to the owner in unbroken male descent. Therefore, if a man has living sons, grandsons and great-grandsons, all of these constitute a single co-partnership with himself. Every one of these descendants is entitled to offer the funeral cake to him and therefore every one of them obtains by birth an interest in his property.

And the author then proceeds to add :

The sons of the great-grandsons would not offer the cake and therefore are out of the co-partnership so long as the common ancestor is alive.

In the case of *Lachmandas* v. *Khunnu Lal* (1) a Full Bench of the Allahabad High Court have held that on a mortgage by a Hindu, subject to the Mitakshara, of a joint ancestral property the sons and grandsons of the mortgagor were equally liable for the interest secured by the mortgage in addition to the principal amount. The learned Judges in that case considered that, although the law of the Mitakshara made a certain distinction in the liability of the son and grandson with regard to ancestral debts, such distinction was not recognized by the British Indian Courts out of the Bombay Presidency. The question of the great-grandson's liability did not form the subject of discussion in that case ; the enunciation was, therefore, confined to the obligation of a grandson.

The High Court of Allahabad, in the present case, seems to have thought that the Hindu Law did not extend the liability for the payment of ancestral debts beyond the grandson. That conclusion seems to be wrong. The law of the Mitakshara proceeds on a logical basis ; rights are created by birth up to the third generation, viz., son, grandson and great-grandson : the son of a grandson is entitled equally with his father to question the validity of debts contracted by the ancestor after his birth. His obligation to discharge the valid debts of that ancestor is, therefore, co-extensive with the rights. This view is supported, not only by the principle on which the liability of the descendants is based, but by express rules. Mitra Misra (the author of the Viramitrodaya) states the rule thus :

The term 'sonless' used in the text (on succession)—such as 'The wife and the daughters also, etc.'—indicated the default of the grandson and the great-grandson also. The succession of the wife is proper only in default of male issue down to the great-grandsons. For the duty of the grandsons, too, to pay off the debts is declared in the text, 'The debts ought to be liquidated by the sons and grandsons (puttrapauttrais) ; but if anyone else were to take the estate in spite of the grandson, then the declaration of the grandson's liability to discharge the debts would be unreasonable, since by reason of the debt—'The heir to the estate of a person shall be compelled to liquidate his debts,'—he alone who takes the estate is declared liable to discharge the debts. If it be argued that the grandson is included under the term 'gentiles' and as such may take the estate, then in that case there would be no use for the special provision regarding the grandson's liability to discharge the debts, since it would follow from the text alone, viz : 'The heir to the estate of a person shall be compelled to liquidate his debts.' If it be said that the grandsons are liable in the same way as sons to liquidate the debts, although they do not get the grandfather's estate, then *a fortiori* it follows that when property is left by the grandfather, the right of any others than the grandson ought not to take place. The same reason applies to the great-grandson also.

Then, after discussing the meaning of the word "puttrapauttrais" he proceeds thus :

Accordingly the different sorts of provisions for the liquidation of the debts by the great-grandsons, as distinguished from the same by the grandsons, and by the grandsons as distingushed from the same by the sons, become consistent with reason. Otherwise there would arise the objection of assuming a peculiar provision so far as regards the great-grandsons.

Again Vijnaneswara, commenting on the following enunciation of Yajnavalkya ; II, 50 (a) :

The father being gone to a foreign country or deceased (naturally or civilly) or afflicted with an incurable disease, the sons or their sons must pay his debt, but, if disputed, it must be proved by witnesses," states that "Brihaspati says : 'The sons must pay the debts of their father when proved as if it were their own (i. e., with interest) ; the grandson has to pay only the principal while the great-grandson shall not be compelled to pay anything unless he have assets.*

The Hindu lawyers appear to have made a difference in the obligations resting upon sons, grandsons and great-grandsons. The son was bound to discharge the ancestral debt as his own, principal and interest, whether he received any assets or not from the

(1) [1896] 19 All. 26=(1896) A. W. N. 183 (F. B.).

*West and Buhler's Hindu Law (Third Edition), Vol. II, pp. 1241-1242.

Advocate High Court
Jammu & Kashmir

ancestor. The grandsons had to discharge the debt without interest and the great grandson's libility arose only if he received any assets from the ancestor.

The British Indian Courts have held that the son and grandson are not liable for any debt unless they receive assets and that the obligations of each of them, sons and grandsons, are co-extensive. In the case of *Brij Narain* v. *Mangla Prasad* (2), the son's liability is expressly laid down, and their Lordships think that that rule extends equally to grandsons and great-grandsons.

In the present case it is amply proved that in 1901 Jawahir Lal borrowed on a mortgage Rs. 11,000 from one Abid Ali Khan and that in 1903 he similarly borrowed over Rs. 3,000 from certain people of the name of Sri Ram and Ganeshi Lal. Jawahir Lal appears to have died after 1903, and Janki Prasad, his grandson, became manager of the ancestral estate. In 1906 he sold the property now in suit to the defendants for Rs. 18,400. It is established to the satisfaction of both the Courts in India that out of the consideration for the sale, Rs. 3,000 odd went to the discharge of the debts due to Sri Ram and Ganeshi Lal. The Subordinate Judge has found on the evidence that a large portion of the said consideration amounting to Rs. 12,700 was applied by Janki Prasad to the discharge of the debt due to Abid Ali Khan. A certain balance was left outstanding and the mortgagee brought a suit against Janki Prasad and Damodar Prasad, the plaintiff, for the balance. The plaint in that suit is Exhibit E. It states that :

> Rs. 3,072-13-0, principal, and Rs. 935-3-0 interest, in all Rs. 4,008, was still due to the plaintiffs from the defendants, and the property mortgaged, after deducting Rs. 12,700 which the plaintiff had received.

It goes on to state further that :

> About six years ago, Lala Jawahir Lal, the principal mortgagor, died. Defendant No. 1 is his grandson, and Defendant No. 2 his great-grandson; and the family of all the above-mentioned three men was a joint Hindu family. and debt was contracted for family necessity, Now the defendants are in possession of the hypothecated property and liable for payment of the debt.

On this claim a decree was made against Janki Prasad and Damodar Prasad for the sum of Rs. 4,614, and, on the 14th July 1914, Janki Prasad put in an application depositing that amount.

Counsel for the appellants was quite justified in laying stress on this application as showing that Janki Prasad and Damodar Prasad never questioned in that suit the legality of the mortgage to Abid Ali Khan and accepted the full benefit of the discharge of Abid Ali Khan's mortgage.

Their Lordships are of opinion that the view taken by the High Court regarding the obligation of the great-grandson to pay the debt of the ancestor is not well-founded in law. In this case the recognized obligation resting on the grandson was accepted by Janki Prasad. He had discharged the debt which he was bound to and, in their Lordships' opinion, his son could not turn round to say that it had been invalidly discharged. Their Lordships are of opinion that it had been amply proved in this ease that the sum of Rs. 12,700 was applied to the payment of Abid Ali Khan's mortgage.

The only sum that was left unaccounted for was Rs. 2,000 odd, as found by the Subordinate Judge. Janki Prasad, the plaintiff's father, admittedly received the whole consideration, and was the man who used the largest part of the money for the discharge of the ancestral debts. He conld have told in his evidence how the sum of Rs. 2,000 was applied. There is no evidence that it was used for immoral or unauthorized purposes. His testimony was therefore most material in the case. Efforts were made to get him into the witness box, but he studiously avoided appearing in Court. The Subordinate Judge says father and son were living together at the time, and he surmised that he was in collusion with his son. In this view the learned Judges of the High Court appear to agree. Their Lordships have no doubt on the facts that the present action is a collusive one, that the testimony of Janki Prasad as to the application of the balance of Rs. 2,000 was deliberately withheld, and that the transfer in 1907 by the father to the son was equally collusive.

In their Lordships' judgment, the ruling in *Vadivelam Pillai* v. *Natesam*

(2) A. I. R. 1924 P. C. 50=46 All. 95.

Pillai (3) does not apply to the facts of this case.

On the whole case, their Lordships are of opinion that the judgment and decree of the High Court should be set aside and the plaintiff's suit dismissed with costs, and they will humbly advise His Majesty accordingly. The respondent will pay the costs of this appeal.

Appeal allowed.

Solicitors for Appellants—*H. S. L. Polak.*

(3) [1914] 37 Mad. 435=23 M. L. J. 256=16 I. C. 935=(1912) M. W. N. 851.

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* A. I. R. 1926 Privy Council 109

(*From Allahabad*)

16th July 1926

LORDS PHILLIMORE & CARSON
MR. AMEER ALI AND SIR JOHN WALLIS

(*Sheik*) *Nasir-uddin* and *another*—Appellants.

v.

Ahmad Husain and *others*—Respondents.

Privy Council Appeal No. 179 of 1924 and Allahabad Appeal No. 29 of 1922.

(*a*) *Civil P. C., O. 6, R. 4—Defence—Points as to fraud or forgery should be specifically pleaded—Practice—Plea.*

Where defendants challenged the contract of sale by plaintiffs on the grounds of forgery and fraud but these points were not pointedly put in the defendants' written statement, and, though perhaps open under the general words of the defence and on the issues, it was put without detail or colour, was not raised in the cross examination of the plaintiffs or his witnesses, and was only disclosed when defendants' witnesses, after an interval of several months, came into the witness box.

Held: that these defences should not be easily accepted. [P 109 C 2]

* (*b*) *Transfer of Property Act, S. 74—Purchaser paying mortgagee—Purchase found invalid owing to existence of prior contract of sale—Purchaser is substituted in mortgagee's place.*

Where a sale of property is found to be invalid owing to the existence of a prior contract of sale by the vendor, but the purchaser has in the meantime paid mortgages on the property, he is entitled to stand in the shoes of the mortgagee whom he has paid off. [P 110 C 1]

L. DeGruyther and *B. Dube*—for Appellants.

Lord Phillimore.—This is a suit brought for the specific performance of an alleged contract to sell land. The contract is said to be contained in two documents, one stated to have been signed by the son of Defendant No. 3, who was the managing member of the Hindu family which owned the property; the other, dated the next day, said to have been signed by the father. The suit was brought against the father and against two persons who claimed that they had purchased the property under a subsequent contract and who denied the existence and validity of the first contract.

The Subordinate Judge found that the contract relied upon by the plaintiff was either a forgery or a fraud, a d, further, that it was an improvident sale which could not be supported against the other members of the family and for which, therefore, no specific performance could be decreed.

On appeal the High Court at Allahabad came to a different conclusion. The Chief Justice and Gokul Prasad, J., held that the plaintiff had made out his case for the actual execution of the contract and that it was not an improvident sale. They further doubted whether the subsequent purchasers could raise the question of improvidence. It is from this decree that the present appeal is brought.

The first question is one of fact. There are many difficulties in the plaintiff's way and these were recognized by the Judges in the appellate Court and have been brought before their Lordships in a most forcible argument. But being so recognized by the appellate Court, they did not appear to the learned Judges to be sufficient to displace the case of the plaintiff or to counterbalance the difficulties in the rival story. Their Lordships do not propose to refer these matters in detail. Perhaps the most striking observation made by the Judges in the appellate Court is that the case of the defendants involving forgery or fraud was not pointedly put in the defendants' written statement, and, though perhaps open under the general words of the defence and on the third issue, it was put without detail or colour, was not raised in the cross-examination of the plaintiff or his witnesses, and, as far as can be seen, was only disclosed when defendants' witnesses after an interval of several months, came into the witness box.

This being so their Lordships, on the whole cannot advise His Majesty to

reverse the finding of the appellate Court on this point.

Then as to the question of the providence of the bargain, it should be observed in limine, that the only appellants before the Board are the subsequent purchasers. It is suggested on behalf of the appellants that under their purchase they acquired all the rights of the family and can use, therefore, any defence open to any members of the family. The Judges in the appellate Court thought that this was not so and that the point was one which could not be taken by the present appellants. Their Lordships are not satisfied that the Judges in the appellate Court were right upon this ; but they do not feel it necessary to pronounce upon this point or upon any point which may be said to involve the locus standi of the present appellants in this matter, because upon the whole, they cannot advise His Majesty to reverse the decision of the High Court on this second question of fact.

It is no doubt true that the present appellants, acting, as both Courts have found, with a knowledge of the plaintiff's claim, contracted for a larger sum of purchase money than the plaintiff had agreed for ; but there seems to have been a reason why they should be anxious to get the whip hand of the plaintiff, and if the matter be looked at apart from the question of the higher bid made by the appellants, the sale to the plaintiff would seem to have been at a handsome price.

The decree of the High Court must, therefore, stand.

There are, however, two points which may have been intended to have been provided for in the working out of the preliminary decree which the High Court has granted but which it is desirable to make clear and put beyond question. It seems that the appellants have, in virtue of their claim to be purchasers, discharged mortgages upon the property. In respect of any money paid by way of such discharge they are entitled to stand in the shoes of the mortgagees whom they have paid off.

Further, inasmuch as this suit was brought against the father only and not as against the other members of the family, the rights of the latter, if so minded to challenge the providence of the sale, must be preserved.

Their Lordships will, therefore, humbly recommend His Majesty that the judgment of the High Court should be affirmed and the cause remitted, with two declarations—(1) that in respect of any moneys properly paid by the appellants towards the discharge of mortgages upon this property, the appellants are entitled to a charge upon the property for any sums so paid by them which might have been rightfully due under the same mortgages ; and (2) that the decree of the High Court is not to be taken as precluding the members of the family of the third defendant from disputing the validity of the sale as being one made in excess of the powers of the third defendant as manager of the joint family property.

There has been no appearance for the respondents and, therefore, there need be any order as to costs.

Appeal dismissed.

Solicitors for Appellants—*H. S. L. Polak.*

A. I. R. 1926 Privy Council 110

(From Patna)

8th February 1926.

VISCOUNT DUNEDIN, LORD BLANESBURGH, SIR JOHN EDGE, AND MR. AMEER ALI.

Gajadhar Prashad Sahu—Appellant.

v.

Mahadeo Prashad Sahu — Respondent.

P. C. A. No. 42 of 1924 and Patna Appeal No. 2 of 1923.

Compromise decree—Partition decree providing properties A to be substituted for properties B—Clause providing that one should be indemnified by the other party in case of sale of such properties—Right of party, to be put in a position to which he is entitled, depends on the proposition that under the decree he is entitled to be indemnified.

Where in a partition suit a compromise decree was passed and by it certain properties A were allotted to one party and other B to other party and where there was another compromise decree, the effect of which was simply to substitite A for B and B for A, and where in the subsequent decree there was a clause providing that if the plaintiff or the defendant sold at a time when he was in possession under the previous decree, any of the said properties respectively allotted to

him, he should pay to the other party the consideration money received by such sale, and if any properties have been mortgaged or otherwise encumbered, the party mortgaging or encumbering it should redeem the property or otherwise indemnify the other party against any loss that the latter may sustain.

Held : that the right which the decree-holder has, to be put in a position to which he is entitled, depends on the very simple proposition that under the subsequent decree his opponent has to hand over intact those lands which he got under the previous decree and that if he cannot do it, then he is liable for damages. [P 111, C 1, 2]

A. M. Dunne and *E. B. Raikes* — for Appellant.

L. DeGruyther and *B. Dube*—for Respondent.

Viscount Dunedin.—In this case an uncle and a nephew had certain properties. A partition suit was instituted in which, in 1901, a compromise decree was passed. By it certain properties, which will be referred to as Properties A, were allotted to the uncle, and others, referred to as Properties B, to the nephew. In 1904 another suit was instituted in which, in 1908, there was another compromise decree, the effect of which was simply to substitute A for B and B for A.

The present application for execution was instituted by the nephew against the uncle. He says that the properties of which under the decree of 1908 he is entitled to receive possession are not in their entirety in three respects. First, because, between 1901 and 1908, the uncle had made over a certain portion to a family doctor ; secondly, because zirat lands which he (the nephew) was entitled to have in his possession had been made over to tenants under leases, and, thirdly, because certain other lands had been let on leases not for their full value, but in respect of a sum down, which had been paid to the uncle.

The learned Judges of the High Court, differing from the learned Judge of first instance, held that the decree-holder was right as to what he said, but they came to their decision in respect of a certain term of the decree of 1908. The decree of 1908, after providing that the one set of properties should be changed for the other, went on, under Cl. 7, to say this

> That if the plaintiff or the Defendant No. 1, has sold at a time when he was in possession under the decree of the 17th April 1901, any of the said properties respectively allotted to him he do pay to the other party the consideration money received by such sale, and if any property have been mortgaged or otherwise encumbered, the party mortgaging or encumbering it do redeem the property or otherwise indemnify the other party of any loss that the latter may sustain.

Accordingly, when they come to deal with the question in dispute, they say, referring to these properties :

> The question with regard to these properties is whether the disposition of them made by the respondent was an encumbrance in respect of which under the terms of the decree, which I have read, there would be a liability upon the respondent to indemnify the appellant.

Their Lordships think that, although in substance the learned Judges of the High Court were quite right, they have not put it on the proper ground. It is not really because of that Cl. 7. Cl. 7, was put in in order to get rid of the general question as to damages if one of those things should happen. But their Lordships consider that the right which the decree-holder here has, to be put in a position to which he is entitled, depends on the very simple proposition that under the decree of 1908 his opponent has to hand over, so to speak, intact those lands which he got under the decree of 1901, and, if he cannot do it, then he is liable for damages.

Their Lordships, therefore, propose that the decree should be varied in its form ; that the case should go back to the learned Judges in India to determine what damage the respondent has suffered in respect of : (1) the gift to the doctor ; (2) the deprivation of the personal possession of the zirat lands ; (3) the letting of other subjects at lower rents in respect of a sum paid and received by the respondent. The case will then be worked out on those lines. Subject to this variation, the appeal will be dismissed and the appellant will pay the respondent's costs.

Their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for Appellant. — *Watkins and Hunter.*

Solicitors for Respondent. — *T. L. Wilson and Co.*

** A. I. R. 1926 Privy Council 112

(*From Patna*)

6th July 1926.

VISCOUNT DUNEDIN, LORD ATKINSON AND MR. AMEER ALI

Niladri Sahu—Appellant.

v.

Mahantan Mahant Chaturbhuj Das and *others*—Respondents.

Privy Council Appeal No. 81 of 1924 and Patna Appeal No. 17 of 1923.

* * *Hindu Law—Alienation by manager of endowment—Immediate cause of borrowing should be considered.*

To determine whether mortgage by Shebait of Muth property is binding on Muth, it is the immediate, not the remote, cause, the causa causans, of the borrowing which has to be considered.

Where the immediate cause of the borrowing was the Muth's need of money to carry on and pay for its services, and the remote cause of the Muth's need was due to profligate expenditure of the shebait:

Held: that a decree should be pronounced declaring that the debt should be paid by the shebait personally or else realized from the profits of the debottor property: 2 *I. A.* 245, (*P. C.*), *Foll.* [P 118 C 2]

L. De Gruyther and *E. B. Raikes*—for Appellant.

W. Wallach—for Respondents.

Lord Atkinson.—This is an appeal from a decree of the High Court of Judicature at Patna, dated the 17th March, 1923, dismissing an appeal from a decree of the Subordinate Judge of Cuttack, dated the 28th February 1922, who in a suit for sale on a mortgage had passed a money decree only against Defendant No. 1, but had, in other respects, dismissed the plaintiff's claim.

The defendant, the mortgagor, is the Mahant of the Muth of a Thakur or deity of the Vaishnavites called Sri Jagannath Mahaprobhu at a place called Puri. It includes a temple with idols in it. The defendant, with, as it is alleged, the view of increasing the income of the Muth, built as an addition to it a lodging house, where Rajahs and other rich devotees visiting the Muth might obtain during their visit, comfortable lodgings, and built in addition a large hall where food might be supplied to those devctees who might visit the Muth and worship at it.

The revenue of the Muth, though sufficient to meet the ordinary expenses of the worship in it, was insufficient to meet in addition the cost of the construction, maintenance and management of these new buildings. The defendant was accordingly, from the year 1891 downwards, obliged to borrow from time to time from moneylenders on notes of hand, setting forth the purpose of the loans, various sums of money, bearing interest at Rs. 2 per mensem or more. The actual sum expended on the construction of these pucca buildings, as they were styled, only amounted to Rs. 9,337, so that the outlay could not be considered to have been of an extravagant character. Owing, however, to the very high rate of interest charged by the lenders, the defendant's indebtedness to these latter amounted by November, 1906, to the large sum of Rs. 25,000. To meet this indebtedness, the defendant the shebait, on the 6th November 1906, borrowed from the plaintiff the sum of Rs. 25,000, bearing interest at a rate only equal to one-half the rate he had been paying on the loans obtained from moneylenders, namely, 1 per cent. per mensem, and in order to secure the repayment of this loan and the interest accruiug upon it, he gave to the plaintiff a mortgage of certain properties which were at the time, and still admittedly are debattor properties belonging to the Muth, and not to any extent or in any respect the properties of the defendant. These properties are enumerated and described in a schedule attached to the mortgage deed.

As the defendant, on some very unconvincing excuse of illness, obstinately refused to appear as a witness at the trial of this case before the Subordinate Judge at Cuttack, or to examine any witness on his own behalf, or to produce his books, though he had been summoned to produce them, it becomes necessary to extract from the mortgage deed a lengthy extract detailing what was the defendant's real action and what were his objects in undertaking to build a pucca building of the manner described. As he executed the mortgage deed, he must be bound by this narrative, despite his embarrassing refusal to give evidence, to examine any witness in his behalf, or to produce his books, which, of all things, were of the most importance, as they must have

shown how much of the borrowed moneys was spent in building the pucca houses and how much on the ordinary service of the Muth.

The extract referred to runs as follows :

That ere this I had borrowed money from several mahajans for the amritomonohi expenses of Shree Jagannath Mahapravu, for the seba and puja of the Thakur in Barasanth Muth in my marfatdari situate in Markandeswar Sahi, Town Puri and to meet other necessary and legitimate expenses in connexion therewith. Being unable to pay the principal and interest, and being in urgent need of money to preserve Muth properties, to increase the profits accruing therefrom and to improve the condition of the said Muth, I borrowed Rs. 20,000 by a registered bond dated the 18th July 1902, from Bhikari Misra and others, of Markandeswarsahi, Puri, in order to pay off the aforesaid legitimate debts and to build the pucca one-storeyed and two-storeyed buildings and lodging houses, etc., of the Muth. With that amount I paid off the debts heretofore contracted for the legitimate expenses of the Muth and the balance I spent for the pucca buildings and cutcha house of the Muth and for the amritomonohi expenses of Shri Jagannath Mahapravu and the Thakurs of the Muth. Being unable to pay regularly the interest of Rs. 300 a month, due on the said sum of Rs. 20,000, and to pay off the principal and interest, though repeatedly called upon by the creditors, I requested you to lend money. As you agreed to lend me Rs. 25,000 at a low rate of interest, i. e., at Re. 1 p. c. p. m. for the Thakurs, I have thought of paying off the principal and interest due on the said registered unsecured bond dated 18th July 1902. As the said amount was borrowed for the Thakurs and for the preservation and improvements of the properties of the Thakurs, I hereby mortgage to you the properties of the Thakurs as security for payment of the amount which I borrow from you. To pay off the said principal and interest the Thakurs, the Muth and I personally remain liable. On the aforesaid terms I take loan of of Rs. 25,000 in cash from you, and as to security for payment of the principal and interest I mortgage to you the entire Mouza Duaypur amritomonohi lakhraj.

It contains also a personal covenant by the defendant, in the following words, to pay the mortgage debt and the interest thereon. It will be found at p. 16, Part III, line 14, and runs thus :

I hereby execute this mortgage bond of my own free will and accord without being influenced by others, and agree that I shall pay the principal of Rs. 25,000 and interest thereon at 1 p. c. p. m. within one year from this date, and redeem the mortgaged property and take back this bond.

The properties comprised in the mortgage are enumerated and described in great detail in the schedule annexed to this instrument. They include, amongst other kinds of property, the two entire Mouzas of Durgapur, 288·36 acres in extent, and include also some land rent free and some let to tenants, and also the entire Mouza Barudi, 644·17 acres in extent. They include a great number of homesteads, of houses, gardens, miscellaneous crops and some waste land, etc. etc. The plaintiff on the 23rd December 1920, instituted in the Court of the Subordinate Judge of Cuttack the suit out of which this appeal has arisen, claiming to recover from the defendant the sum of Rs. 43,114-10-8 due to him for principal and interest under the mortgage deed and praying that a decree might be passed directing the defendant to pay the said sum to the plaintiff within the time prescribed by the Court.

It will be observed that this is entirely a personal claim against the defendant to pay the debt he owes and has covenanted to pay, and the remedy prayed for is a personal remedy against him, worthless most probably to the plaintiff. The plaintiff then prays for alternative relief in the following paragraphs :

(Kha) That if the Defendant No. 1 does not pay the decretal amount, etc., within the prescribed time or deposit the same in the Court, his right to redeem the mortgaged properties be forfeited and the decree be made final and the mortgaged property be put up to sale, and out of the sale consideration the plaintiff may be paid the decretal amount, etc.

(Ga) That if the sale consideration of the mortgaged property be found insufficient for the satisfaction of the decretal amount, etc., due to the plaintiff, the Court may be pleased to pass a decree awarding the balance to the plaintiff from Defendant No. 1 and the other moveable and immovable properties of Barasanth Math.

(Gha) That the Court may be pleased to pass a decree awarding the plaintiff such other relief as he may be deemed entitled to in the justice of the Court.

To this plaint the defendant, the shebait, filed a long written statement signed by his agent. It begins with the assertion that the plaintiff's claim is wholly false and fraudulent. It contains many statements directly contradicted by the contents of the mortgage and other written documents to which the defendant has put his hand and by which he obtained the loan of the money sued for. It is, on the whole, a mean and mendacious production, and it is not to be wondered at that no witness was put forward, or possibly could be found, to give evidence in its support. On these pleadings several issues were

raised. Of these the following five, with the answers to them, are alone relevant :

1. Is the suit bad for defect of party ?
Finding, First Court : Yes.
Appellate Court : No.
2. Was the bond in suit executed for legal necessity and benefit of the Thakur (god) ?
Finding of both Courts : Not for legal necessity.
3. Were the alleged debts preceding the bond in suit for legal necessity and benefit of the idol ?
Finding of both Courts: Not for legal necessity.
4. Is the plaintiff entitled to a mortgage decree ?
Finding of both Courts : No.
5. To what relief is the plaintiff entitled ?
Finding of both Courts : Only a personal decree against the defendant.

The main defences relied upon by the defendant, as the shebait, were that :

15. There was no legitimate and legal necessity for borrowing the amount of the bond in suit. The said bond is wholly inoperative and invalid according .to law against the amrutamonhai debottor property and the Thakur.

23. The acts of the Defendant No. I were not the acts of a prudent manager of the debottor property, and by his acts the debottor properties have been ruined and wasted and the debts have swelled. No improvement has been made of the Muth or of the amrutamonhai property.

Had he been examined and properly cross-examined he must have either disproved these allegations in whole or in part ; or if he came into the witness box he must have admitted that these pucca buildings were wholly useless and of no benefit to the Muth, though for nine or ten years he had continued to construct them, or that they were—some of them actually within the Muth—part of the Muth and were fuuctioning wholly to the benefit of the Muth in the way he had hoped, designed and intended they should function ; and if he admitted this latter, he would then, if properly cross-examined, have been required to explain upon what principle of justice or equity, when they functioned in the way above mentioned, he refused to pay the man whose money built or helped to build them—the money had been lent him. His excuse for not coming forward as a witness in obedience to a summons served upon him was that he was ill, of what disease he did not say. No medical evidence was given to support that excuse. But his books were not ill. They must have shown how the money borrowed by him had been applied, how much of these loans had been expended for building the pucca houses, and how much if any, for the services of the idol and the general expenses of the temple. It certainly looks as if the design of the defendant was not to have this case decided on a full examination of all the relevant actual facts involved in it, but to keep from the knowledge of the judicial tribunals all the relevant and decisive information touching the enterprise from which the action springs. In the result, as might have been expected, not a particle of evidence was produced to prove any one of the allegations of fact contained in these defences. It would appear to their Lordships that this case proceeded as if, in some degree, all the loans discharged by the Rs. 25,000 lent on the mortgage had been spent in constructing the pucca houses. This is an entire mistake. Fortunately, in the interest of justice, the plaintiff has been able to secure several documents dealing with several of these loans. These documents, 13 in number, will be found in the Appendix, Part III, from page 2 to page 13, inclusive. Two of them, bonds dated the 28th March 1891, and 23rd March 1895, deal with loans expressed to be contracted to pay for the amritomonohi expense and "my" (i. e., the defendant's) Muth, and both are signed by the defendant.

A bond, dated the 25th June. 1896, deals with a loan of Rs. 1,300 to meet the daily amritomonohi of the Muth and to purchase stones, wood, bamboo, and other materials. This bond and all the following are signed by the defendant. The next is dated the 28th August 1897. Its opening sentences are worth repeating. They run thus :

Being in need of money to pay the cost of the timber and fees to the Raja of Baramba for making beams, etc., for the pucca building which I am constructing on the Sadar Danda of the Muth, I borrowed .ere this from your Stridhan through your husband on the 9th June of the current year Rs. 200, on the 30th Rs. 200, on the 3rd July Rs. 82, and on the 24th July Rs. 200. Being in further need of money for current expenses, I take loan from you of Rs. 318 in cash out of your Stridhan through your husband.

Another bond, dated 28th August 1897 sets out that on the 25th June 1897 Rs. 200 were borrowed on a registered bond, that being in further need of money to meet the cost of litigation and the daily amritomonohi expenses, the defendant borrows an additional sum of Rs. 1,000 at interest at Rs. 2 per cent. per mensem. On the 19th September

the defendant executed a bond borrowing Rs. 3,000, being in need of money to construct pucca buildings of the Muth, and to meet amritomonohi expenses. On the 9th November 1900 the defendant borrows Rs. 900 at 3 per cent. per mensem, "being in need of money to construct pucca, etc., of "my" (sic), Muth and to carry on the Bhog etc., of Shree Jagannath Mahaprobhu."

On the 3rd December 1900, the defendant borrows Rs. 2,500 on note of hand for expenses the same as those last mentioned and on the 28th of the same month the defendant executes a bond for the loan of Rs. 470 for amritomonohi expenses of his (sic) Muth and the construction of pucca buildings. On the 26th January 1901 he borrowed on bond Rs. 200 for the necessary expenses "of my (sic) Muth." On the 18th July 1902 the defendant signs a document enumerating the sums he had borrowed up to Rs. 4,900 for the purpose of carrying on the amritomonohi expenses of Shree Jagannath Mahaprobhu, and for the construction of the pucca building and the kachha dilapidated houses of the Muth, as well as other legitimate expenses, and then takes a loan of Rs. 8,808 which, together with the enumerated sums, brings up his indebtedness to Rs. 20,000, for which he signs a bond.

These details are in agreement with the statements of the defendant, contained in the mortgage deed of the 6th November 1906. As to the various sums secured by bond for which he admits he was indebted the plaintiff was examined on his own behalf and cross-examined at considerable length. Three additional witnesses were also examined on his behalf. (The judgment narrated their evidence and concluded). Nothing of importance was elicited from these witnesses on cross-examination. It appears to their Lordships that the fair inference to be drawn from this uncontradicted evidence, coupled with the mortgage and the bonds already referred to, is that the building project which the defendant promoted has been successfully effected by the use of a portion of the moneys borrowed by the defendant; that it has been completed in great part if not entirely; that it is functioning as contemplated by its author; that the Muth is to a great extent benefited by it, in that worshippers are more numerous and of a richer class than theretofore visited the Muth for devotional purposes, attracted presumably by the increased and more civilized accommodation the new buildings afford.

Their Lordships think that this evidence completely refutes the statements of fact upon which the main defence put forward by the defendant rests.

A partition suit was instituted between the plaintiff and his brothers, and the brothers were consequently made formal defendants in this suit, the real defendant who contracted the loan being styled Defendant No. 1; but the Sub-Judge, quite properly, put the claim for partition aside, and the shebait was therefore referred to as the Defendant No. 1. This learned Judge, in delivering judgment, said:

> When it is clear that the properties (i. e., the properties mortgaged) do not belong to the Defendant No. 1, but to the Thakurs, and when the bond in suit was not executed by the Defendant No. 1 in his capacity as marfatdar of the Thakurs, and if when the decree is to be passed against these properties it is only necessary that the Thakurs should have been parties to the suit and should have one opportunity of refuting the allegations of circumstances made by the Defendant No. 1 personally, which made the bond to all intents and purposes obligatory upon them. Thus the Thakurs are necessary parties to this case.

He said he thought the objection fatal to the suit, and decided that it should stand dismissed.

The Sub-Judge then proceeded to say that after this finding he was not called upon to decide upon the other issues raised in the case, and then proceeded to express himself thus:

> But as I have recorded evidence I think it would not be amiss if I make findings on them. The necessities alleged are building expenses of the Muth, amrutamunahi expenses and feeding of sadhus. Pucca buildings were made where there were kacha sheds and a two-storeyed building added to the Muth for Maharaja and Raja disciples. There is no evidence that Kacha sheds would not have done for old dilapidated sheds of that nature.
>
> There is no evidence also that Maharaja and Raja disciples of the Muth refused contributions to the Math without a two-storied building. In fact, in my opinion, these were not necessities at all but were raised to show to people that the Muth is a rich and big Muth. In these circumstances these buildings cannot be regarded as necessities of the Muth. Then, as regards amritamonohi expenses, the Defendant No. 1 fell short of his fund for amritamonohi purposes as all the money of the Muth cannot be absorbed in the pucca buildings erected, which was done to satisfy either his own vanity or for speculative purposes. The shortage of amritamonohi

expenses therefore cannot come under the head of legal necessity at all. Besides there is no evidence to fix the amount of the amritamonohi expenses borrowed. As for expenses for feeding sadhus for the same reason cannot come in the category of legal necessity. There is also no evidence to fix the exact amount of it.

It did not occur to the learned Judge that but for the convenient illness of defendant all the information he desired could have been supplied to him by the opportune invalid. He then proceeds to add that after making the order he consulted the pleaders, and was convinced by them of what would be apparent to the merest tyro in the profession—that a personal decree should be made against the defendant for money only.

The High Court point out that the Sub-Judge had decided in favour of the plaintiff that the suit was not barred by limitation, and that this finding was not challenged before them, but that he did decide questions 1, 2, 3, 4 against the plaintiff on the ground that the Thakurs were necessary parties, and not having been impleaded, the suit was defective; that there was no legal necessity for the loan to the Thakurs so as to entitle the Defendant No. 1 to mortgage the properties in question; and that the loan did not in any way benefit the Thakurs. The learned Judges in the High Court held that it was obvious that Defendant No. 1 was sued in his representative capacity, and that therefore the deity was not a necessary party, and that the Subordinate Judge's decision on that point was erroneous.

These learned Judges, after referring to the several debts mentioned in the mortgage bond, which the borrowed money, Rs. 25,000, was applied to liquidate, set forth the grounds of their decision in the following passages of their judgment. Referring to the plaintiff's evidence, they say :

The most important of these necessities is said to be the construction of pucca buildings. It is said by the plaintiff that the pucca two-storeyed buildings were required for the Raja-disciples of the Muth, such as Raja of Baramba and Barakhemdi, and during the dol jatra and rath jatra occasions these buildings are used for the putting up of Vaishnavas. One two-storeyed building, the plaintiff says, was built as the temple of the Thakur. One kuccha house was also built inside the Muth where Vaishnavas and pilgrims stay. In cross-examination he says that he heard from Defendant No. 1 that the Maharajas and Rajas gave properties to himself and to the Math. From this it is argued that the aforesaid buildings were necessary for the comfort and convenience of the disciples of position of the Math and possibly that might increase the offerings made to the deity and thus the buildings were calculated to increase the income of the property. The learned Subordinate Judge says that there is no evidence that the Maharaja and Raja disciples of the Muth refused contributions to the Math without a two-storeyed building and that these buildings were not necessities at all but were raised to show to people that the Muth was a rich and a big Muth. It may have been desirable or even commendable on the part of the Mohant to construct such luxurious buildings for the comfort and convenience of the Raja disciples if this could be done out of the savings of the income of the Muth properties. But the construction of such buildings cannot be considered to be such pressing necessities as to justify the construction of them by raising loans. The actual loan taken from 1891 up to 1906 to meet the necessary amrutmonohi expenses and the construction of the pucca buildings amounted to about Rs. 9,337 and the interest, even after payment from time to time swelled the amount of the loan to Rs. 25,000, for which the bond in suit was executed. In the previous loans the exorbitant rate of interest such as Rs. 3-2, Rs. 2 was stipulated for. Where was the necessity for borrowing at such high rate of interest. The considerations for the loan look very much like speculations, and howsoever advantageous it may be the Mohant was not entitled to launch into such speculations by borrowing money at high rates of interest. Therefore the construction of building in question was not a pressing necessity for which the shebait, Defendant No. 1, could mortgage the properties of the Thakur at high rates of interest. The daily expenses of the Muth as well as the amrutmonohi may have been necessary, but in order to show whether there was necessity to meet these expenses by borrowing, it was incumbent upon the plaintiffs to show that the income of the Muth was not sufficient to meet these necessary expenses. The plaintiffs no doubt summoned the defendant to produce accounts of the income and expenditure of the Muth, but they ultimately failed in this attempt. No doubt inference adverse to the defendant may be drawn from this fact, but the plaintiff's witnesses pose themselves to be acquainted with the ins and outs of the Muth; some of them live very close and say that they saw the Jam Kharach Bahis and also satisfied themselves as to the necessity of the loan. It is however, strange that none of them can give any idea of what the income of the properties were,

* * * *

The failure of the Defendant No. 1 to produce the account books does not very much affect the issues in hand inasmuch as it is not denied, and in fact it has been proved that the money was taken for the purpose of constructing the pucca structures for the Raja disciple and for the sadhus. The question is not solved by the establishment of that fact alone. It has further to be proved that they were the dire necessities of the time and could not be postponed and that loans must necessarily have been taken to meet them. I therefore agree with the learned Subordinate Judge that there was no legal necessity for incurring the loans in question.

I also agree with the learned Subordinate Judge when he says that the buildings were constructed only to satisfy either the vanity of the defendant or for speculative purposes.

Their Lordships cannot, in the evidence, find a single particle to support this latter allegation. It has been already demonstrated that the money borrowed by the defendant was not used solely for the purpose of building pucca houses. Had the defendant given evidence as a witness or produced his books, it would probably have been possible to have ascertained what was the amount of the portions of the loan devoted to building purposes and what to the requisite services of the Muth, and that the plaintiff might reasonably be paid in respect of these latter; but that is not the nature of the defence of the defendant. He first shuts up all avenues through which information could be obtained, and then, because the plaintiff does not make the decision the defendant has made it impossible for him to make, the plaintiff is to be paid nothing. There is another matter. Pucca buildings are situated in part in the Muth ; they are used by the Muth authorities as their own ; they are functioning as they were intended to. The defendants and the worshippers use, occupy and enjoy them, but will not pay for them. One could understand razing them to the ground because they were worthless and then refusing to pay for them, but to refuse to pay and yet keep them and use them is a gross injustice and a most unworthy act.

The learned Judges of the High Court appear to their Lordships to be rather of opinion that the procurement of a loan of money on easy terms for the purpose of paying off antecedent loans obtained on very oppressive terms can never, in a case of this character, be held to be a necessary proceeding unless the obtaining of the oppressive loan was, at the time it was obtained, a matter of necessity also.

If these learned Judges held that view, their Lordships cannot agree with them. The case of *Prosunno Kumari Debya* v. *Golab Chand* (1) was decided by a Committee of the Privy Council, composed of Sir James Colvile, Sir Barnes Peacock, Sir Montagu Smith and Sir Robert Collier. The respondent obtained two decrees against the former shebait of an idol upon the latter's bonds for the repayment of moneys alleged and found to have been borrowed for the service of the idol and the expense of the temple. Both decrees directed that the debt should be paid by the shebait personally, or else realised from the profits of the debottor lands.

The appellants were the two succeeding Shebaits of the idol. They instituted a suit to set aside these decrees and to have the debottor property released from the attachment issued in execution of the decrees. It was held that the decrees, being untainted by fraud or collusion, as they were held to be, and having been passed after the necessary and proper issues had been raised and determined, were entitled to the force due to judgment of competent Courts, and were binding on the succeeding shebaits who were continuing representatives of the idol's property. Sir Montagu Smith, in giving judgment, first pointed out that the case did not come before the Council by way of appeal from the decrees sought to be impeached, but upon a fresh suit to set them aside. He then stated the facts of the case. This Raja Baboo, the appellant, the former shebait, was, he said, a man of profligate habits, and having spent the income of the debottor property on his own pleasure, borrowed Rs. 4,000 from the respondent to repay the expenses of the idol and of repairing the temple. As security for this advance he gave a bond to the respondent, and also a vahinama, by which he pledged the debottor property for the payment of the money. In both securities it was stated that the money was needed for the services of the idol and the expenses of the temple. The Judge of the Zillah Court of Dacca gave a decree for the respondent, having found that the money had been borrowed and expended for these purposes, but that the specific pledge of the property could not be enforced, that a decree founded on the bond for the money lent might be given, to be realized out of the debottor lands, and he framed the decree. Their Lordships held that they were only sitting to determine the operation and effect of the two decrees as they stood, not whether they were right or wrong on questions of law or fact, and approved a decree in the form suggested. But the learned Judge did

(1) [1874] 2 I. A. 145=4 B. L. R. 450=23 W. R. 253=3 Suther. 102=3 Sar. 449 (P.C.)

not lay down this proposition: that though property devoted to religious purpose is, as a rule, inalienable, it is, in their Lordships' opinion, competent for the shebait of property dedicated to the worship of an idol, in his capacity as shebait and manager of the estate, to incur debts and borrow money for the purposes of expenses in keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power, however, to incur debts must be measured by an existing necessity for incurring them.

The importance of this case in its application to the present consists in this: that it was the immediate, not the remote, cause, the causa causans, of the borrowing which has to be considered. The immediate cause of the borrowing was the Muth's need of money to carry on and pay for its services. The remote cause of the Muth's need was due to the profligate expenditure of the shebait. It would have been no answer to the creditor's suit to say:

> Oh, your money was only borrowed because the income of the Muth was spent by a profligat shebait and there was no money available to carry on the services of the Muth.

So in the present case. Even if the building scheme of the defendant had been reckless, inconsistent, unsound and liable to fail, which, by the way, has not been proved, what drove him to borrow this money, Rs. 25,000 on mortgage, to pay old debts, and so be relieved of the oppressive burden which the exorbitant rate of interest at which these earlier loans were made imposed upon him, It was the high rate of interest, which he was already bound to pay, that was the necessary and immediate cause of his giving this mortgage, though the remote cause of it was the getting into debt by the building operation. In their Lordships' view the principle of the case of *Prosunno Kumari* v. *Golab Chand* (1) applies to this case. They therefore think the appeal succeeds, that the judgment appealed from was erroneous and should be set aside, and that a decree should be pronounced in the form adopted in this latter case, declaring that the debt should be paid by the shebait personally or realized from the profits of the debottor property.

The case should be remitted to the High Court with the following direction, viz:

That the High Court should make a personal decree against the defendant for the payment of the debt within a specified time, and on his failure to pay, to direct an enquiry to be held by the Court of the Subordinate Judge as to the sums legitimately attributable to the endowment under the Hindu Law, and a Receiver should be appointed to realize the rents and profits of the debottor estate, and the shebait's share, after payment of a maintenance allowance to be fixed by the Court, should be allocated for the payment of the plaintiff's debt.

Their Lordships will humbly advise His Majesty accordingly. The first respondent will pay the costs of the appeal.

Appeal allowed.

Solicitors for Appellant—Watkins and Hunter.

Solicitors for Respondents—W. W. Box and Co.

A. I. R. 1926 Privy Council 118

(From Calcutta)

11th May 1926

VISCOUNT DUNEDIN, LORD ATKINSON AND MR. AMEER ALI.

Lakshman Chandra Mandal—Appellant.

v.

Takim Dhali and *others*—Respondents.

Privy Council Appeal No. 14 of 1925, Calcutta Appeal No. 5 of 1924.

Civil P. C., O. 2, R. 2—Suit for possession—Possession failing, refund of purchase money asked—Question whether purchase was speculative not investigated—Leave granted to purchaser to file a separate suit raising that question is proper.

Where in a suit for recovery of possession of property the purchaser having failed to recover possession asked for repayment of purchase money and the question whether the purchase was a speculative purchase or a purchase under such circumstances as would warrant a good title had not been investigated and the purchaser was directed to raise the question in a separate snit

Held: that the procedure adopted was right. [P. 119 C. 1]

De Gruyther and *H. N. Sen*—for Appellant.

A. M. Dunne and *Hyam*—for Respondent.

Viscount Dundein.—The appellant-plaintiff in the case is the purchaser of

two-thirds of a certain leasehold property which he says originally belonged to Idu Sana from whom his vendors are descended, in right of two sons of Idu Sana, and he sues the defendant-respondent who is in possession, he having acquired the whole property from Budhai the other and remaining son of Idu Sana.

The whole point in the appeal therefore depends upon whether the leasehold in question was originally settled with Idu Sana who was the head of the whole family here represented, or whether it was originally settled with one of his sons Budhai. Budhai was undoubtedly in possession, and it was necessary for the plaintiff to prove his case. He attempted to do so by bringing forward certain statements that were made in various litigations that had happened, but upon looking into those litigations the learned Judge of first instance and the High Court both came to the conclusion that the statements made were absolutely contradictory and therefore no affirmative proof for what the plaintiff wished to deduce from them. The oral evidence suffered the same fate ; it was contradictory and was not believed and accordingly, there again, we have concurrent findings that the plaintiff has not made out his case. That really disposes of the merits of the case.

There is a second branch of the case as launched in which the disappointed purchaser owing to the result of what has been narrated, asks for repayment of the price which he has paid. It is quite clear that that point was never really investigated in the Courts below. It was never been gone into as to whether it was a truly speculative purchase or a purchase under such circumstances as would warrant a good title, and accordingly the learned Judge said he could not decide the matter, but gave leave to the plaintiff to raise the question in a separate suit. That also was confirmed by the High Court.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

Solicitors for Appellant— *Ranken Ford & Chester.*

Solicitors for Respondents—*Barrow Rogers & Nevill.*

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* * A. I. R. 1926 Privy Council 119

(*From Bombay* : *A. I. R.* 1925 *Bom.* 79)

26th July 1926

LORD CHANCELLOR, LORD JUSTICE WARRINGTON AND CHIEF JUSTICE ANGLIN

Sobhagmal Gianmal—Appellant.

v.

Mukundchand Balia—Respondent.

Privy Council Apeal No. 1 of 1926.

* * (*a*) *Contract Act, S.* 30—*Contract of cutcha adatia agency is not a wagering one—Contract Act, S.* 182.

When a cutcha adatia enters into transactions under instructions from and on behalf of his up-country constitutent with a third party in Bombay, he makes privity of contract between the third party and the constituent, so that each becomes liable to the other, but also he renders himself responsible on the contract to the third party. He does not ordinarily communicate the name of his constituent to the third party, but he informs the constituent of the name of the third party. The position, therefore, as between himself and the third party is that he is agent for an unnamed principal with personal liability on himself. His remuneration consists solely of commission, and he is in no way interested in the profits or losses made by his constituent on the contracts entered into by him on his constituent's behalf. Hence a contract of cutcha adatia agency is not a wagering contract. *Forget* v. *Ostigny* (1895) *A. C.* 318, *Ref.* [P. 120, C. 1]

* * (*b*) *Contract Act, S.* 30—*Teji Mandi contracts are not presumed to be wagering.*

There is no presumption that transactions of Teji Mandi contracts are wagers, and in the absence of evidence to the contrary, they should be treated as geninue contracts : *A. I. R.* 1922 *Bom.* 408, *Appr.* [P. 120, C. 1]

Geo. Lawrence and *E. B. Raikes*—for Appellant.

A. C. Clanson, *G. R. Lowndes* and *R. K. Chappell*—for Respondents.

Lord Justice Warrington.—The question in this appeal is whether the contract between the appellant and the respondent, sought to be enforced in the suit, was a wagering contract, and, therefore, under the provisions of S. 30 of the Indian Contract Act, void and incapable of being enforced.

The respondent (the plaintiff in the suit) carries on business in Bombay as a merchant and agent on commission.

The appellant (the defendant in the suit) is a merchant and at all material times resided in the Native State of Bhopal.

During the years 1914 and 1917 the respondent acted in the transactions in question as commission agent for the

appellant on what are known in Bombay on cutcha adatia terms, the appellant being his up-country constituent.

There is no dispute that as regards cutcha adatia transactions the course of business and the relative positions of the parties are as follows : When a cutcha adatia enters into transactions under instructions from and on behalf of his up-country constituent with a third party in Bombay he makes privity of contract between the third party and the constituent, so that each becomes liable to the other. but also he renders himself responsible on the contract to the third party. He does not ordinarily communicate the name of his constituent to the third party, but he informs the constituent of the name of the third party. The position, therefore, as between himself and the third party, is that he is agent for an unnamed principal with personal liability on himself. His remuneration consists solely of commission, and he is in no way interested in the profits or losses made by his constituent on the contracts entered into by him on his constituent's behalf.

In pursuance of the course of business so described, the respondent, acting as cutcha adatia for the appellant, made forward contracts on his behalf for purchase and sale of Broach and Bombay cotton, and, he also had dealings on his behalf in options on Broach cotton, known as 'Teji Mandi" transactions. These various transactions resulted from time to time in losses which were paid by the respondent, The action is for the balance due to him on his agency account, including his commission :

The contracts for sale and purchase of cotton were, so far as the third parties were concerned, genuine contracts, and not mere gambling transactions. As to the Teji Mandi transactions, there was no evidence to distinguish them in this respect from the forward contracts and the appeal Court has dealt with them on the same footing. Their Lordships think they were right in so doing. There is no presumption that such transactions are wagers (see *Manilal Dharamsi* v. *Allibhai Chagla* (1), and in the absence of evidence to the contrary, they should be treated as genuine contracts.

The only circumstance on which reliance is placed in support of the contention that as between the appellant and the respondent their contract was a wagering contract, is that there was between them an understanding that the respondent would not call upon the appellant either to give or take delivery,

In the Court of First Instance, Kemp, J., pronounced judgment in favour of the appellant and dismissed the suit.

This judgment was reversed on appeal by Shah, Acting Chief Justice, and Kincaid, J., who directed an account of what was due from the appellant to the respondent.

The appellant obtained the leave of the High Court at Bombay to appeal to H. M. in Council and the present appeal was presented accordingly.

In the opinion of this Board the decision of the appellate Court is correct.

The respondent, as the appellant's agent, and acting in accordance with his mandate, made genuine contracts on his behalf with third parties in Bombay. Under these contracts both the appellant and the respondent were bound to the third parties either to perform their obligations or to pay damages for their breach. The respondent having entered into these contracts as agent for the appellant, the latter was prima facie bound to indemnify the former against any liability incurred in respect of them. He was, on the other hand, exclusively entitled to the benefit of them—a gain to the appellant would involve no loss to the respondent, nor would a loss to the appellant result in a gain to the respondent. The only remuneration to the respondent was his commission : See *Forget* v. *Ostigny* (2). The understanding between them referred to above merely means that the respondent would, by covering contracts or otherwise, provide for or take the goods or pay the difference on the appellant's behalf. In all this there is not, in their Lordships' opinion, any element of wagering as between the two parties. As between them neither party stands to win from or lose to the other according to fluctuation of price or any other event. The very essence of a wager between them is thus absent.

Counsel for the appellant raised before this Board a new point founded on Ss. 1 and 2 of the Bombay Act 3 of 1865.

(1) A. I. R, 1922 Bom. 408=47 Bom. 263.

(2) [1895] A. C. 318=64 L. J. P. C. 62=11 R. 474=72 L. T. 399=43 W. R. 590.

But once it is established that the contracts with the third parties are genuine contracts and not wagering transactions, the provisions of these sections have no application and the point therefore fails.

For these reasons, and for those more elaborately stated by the appeal Judges, this Board is of opinion that the appeal ought to be dismissed with costs, and will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for Appellant—*Latley & Hart*
Solicitors for Respondent—*T. L. Wilson & Co.*

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* A. I. R. 1926 Privy Council 121

(*From Calcutta*)

26th July 1926

VISCOUNTS HALDANE AND DUNEDIN, AND LORDS ATKINSON, PHILLIMORE AND CARSON.

Samuel Crawford Hogarth and *others*—Appellants.

v.

Cory Brothers and *Company Limited*—Respondents.

Privy Council Appeals Nos. 93 & 94 of 1925, from Calcutta Appeal No. 1 of 1924.

* (*a*) *Contract — Shipping — Charteerparty—Shipowner not getting berth owing to charterer's fault—Charterer must pay for delay.*

If a ship is prevented from getting to a loading berth owing to an obstacle created by the charterer, or owing to the default of the charterer in performing his duty, then it is well established that the shipowner has done all that is needful to bring the ship to the loading place, and that the charterer must pay for the subsequent delay. Whether the latter's measure of liability is arrived at by giving to the shipowner damages for the delay or whether the lay-days are antedated to the date when they ought to have begun, and the charterer pays for them at the agreed rate of demurrage. does not seem to have been determined. [P 123 C 1]

(*b*) *Privy Council—Practice.*

The rule of the Privy Council is that concurrent findings of fact are not to be disturbed. [P 124 C 1]

(*c*) *Words—'Government, Regulation' does not include rules by Calcutta Port authorities.*

The words "Government regulations and restrictions" do not include local regulations made by the Calcutta Port authorities and affecting the time or manner of loading in the port. [P 123 C 2]

C. T. Lethuesne and *Robert Aske*—for Appellants.

A. T. Miller, *Norman Burkett* and *D. N. Pritt*—for Respondents.

Lord Phillimore.—In this action both plaintiffs and defendants are appealing from the decree of the High Court of Judicature at Calcutta. The appeal of the plaintiffs was preferred before that of the defendants, and the latter is therefore treated as a cross-appeal: but historically the subject of the defendants' appeal comes first and will be taken first in this judgment. The plaintiffs are owners of the ss. "Baron Ardrossan," and they, on the 31st July 1920, entered into a charter-party with Messrs. Graham & Co., of London, acting as agents for the defendants. By this charter-party this steamship was to receive on board at Calcutta,

> at such dock, place or wharf as charterers may direct, lying always afloat, from the said charterers or their order, a full and complete cargo of coal in bulk, which cargo the said charterers bind themselves to ship, or cause to be shipped.

and to proceed with all possible despatch to Colombo, where she was to deliver the cargo. The charter-party contained many of the usual provisions and exceptions which need not be here specified. The important ones for the purpose of this case are Clauses Nos. 3, 11, 12, 13, 22, 24, 25, which are as follows:

3. In the event of war, or disturbances, or strikes, lock-outs, or stoppage of labour, from whatever cause, or pestilence, or epidemical sickness, or earthquakes, fires, storms or flood or the failure on the part of the railways to supply wagons, or detention by railways, or other hindrances beyond the control of suppliers affecting the working of this contract suppliers shall not be bound to deliver nor shall they be held responsible for their inability to do so, and such time not to count as lay-days. The steamer, however, reserves the right to sail from loading port with what she has on board; if, from causes other than the weather, she is delayed more than twenty-four hours no claim resulting against charterers for dead freight.

11. The cargo to be shipped at Calcutta and discharged at port of destination within 18 weather working days (Sundays and holidays excepted) such lay-days at loading port are to count after expiry of usual twenty four (24) hours' notice from Master or Agents of steamer's readiness, steamer having been duly entered at the Custom House, but not until steamer is in berth and not before the 1st December unless with the charterers' consent and steamer ready. The usual 24 hours' notice to be given by the Master at the port of discharge. Holidays which the Chambers of Commerce at Calcutta and port of discharge declare to be working days to count as lay-days.

12. The charterers to have the option of cancelling this charter if the steamer be not ready to load at Calcutta on or before the 25th December.

13. Demurrage, if any, at the rate of Rs. 2,000 per running day, and pro rata for part of a day, payable day by day in cash as incurred.

22. Steamer to be consigned in Calcutta to Messrs. Graham and Co.

24. Steamer to be consigned at port of discharge to Charterers' agents, paying them the usual fee for attending to steamer's business.

25. Subject to Indian Government license for export of coal being obtained, if necessary, and the cargo being released and coals available, and in all respects to customs and other Government regulations, restrictions, or otherwise, affecting the normal shipment of the cargo and clearances and sailing of the vessel.

The charterers made arrangements for the supply of the coal through Messrs. Graham & Co., who in turn arranged for the coal to be supplied and shipped by the firm of Kilburn & Co., who again were managing for the Tata Iron and Steel Co., Ltd. The ship arrived in port on the 27th December, 1920, and the Master forthwith gave notice to Messrs. Graham & Co. that he was ready to load: and his notice was accepted as from 10 o'clock of the following day. But she did not enter her berth till the 13th February 1921. Coal was then begun to be loaded upon her, but there were from time to time delays in the process of loading: and twice over from the 20th February to the 25th February, and from the 27th February to the 9th March, she was removed by the port authorities from her berth out into the docks, because there was no cargo for her. She eventually left Calcutta on the 22nd March, and arrived at Colombo on the 30th. She began her discharge on that day and completed it at 3-15 on the 4th April. The time lost between the 13th February and final discharge has been agreed between the parties as 22 days and 5 hours, the demurrage for which would amount to Rs. 44,416-10-8. The plaintiffs assert that this sum is payable in any event, but they also claim Rs. 94,000 as damages for detention at the same rate as that fixed for demurrage from the 29th December to the 13th February, on the ground that it was by the act or default of the defendants, and their agents that the ship did not reach her berth as soon as she had entered the Kidderpore dock. The defendants denied their liability for both claims and further said that in respect of the claim for demurrage proper, there had been an accord and satisfaction, the plaintiffs having accepted the sum of Rs. 2,076-3-9. in full discharge of their claim for demurrage.

The case was tried in the High Court by Buckland, J., who after hearing oral evidence and receiving many documents which were put in at the trial, decided against the plaintiffs' claim for damages for detention up to the 13th February, but in favour of the plaintiffs' claim for demurrage proper; while he further rejected the defence of accord and satisfaction. He gave judgment therefore for the sum of Rs. 44,416-10-8 with interest and costs. Both parties appealed, and the case was heard in the appellate civil jurisdiction by Greaves, J. and Chakravarti, J., who gave judgment on the 2nd January 1925. By this judgment the claim of the plaintiffs for detention was allowed, but the amount of the damages was left for further determination. The claim of the plaintiffs for demurrage proper was accepted as good in itself, but the defence of accord and satisfaction was maintained, and therefore the decree for this sum was reversed and certain consequential provisions were made about the costs. From this decree as has been said, both parties have appealed.

The defendants put their case in this way: They say that it was not their duty to find a berth for the steamship, and that their duty to load coal only began when the ship was berthed. They deny that they had failed to provide cargo: they deny that there was any delay in fact in the steamship getting a berth; and they say that if there was any such delay, it was due to causes beyond their control. With regard to the interruptions and delay during the loading they relied on failure of the railway company to supply wagons and upon the restrictions imposed by Government upon loading. Generally, they claimed the benefit of the exceptions to the charter-party.

Graham & Co. produced a proper licence for the exportation of coal, and they intended upon the railway company for wagons, and eventually, but not till the 13th January, they opened what is called "a station" for the steamship that is, they procured a place upon the wharf to which coal could be sent for loading and Kilburn & Co. began to send down coal labelled for the "Baron Ardrossan." But, as the "Baron Ardrossan" was not at a berth, coal so labelled was put instead upon other steamships which were also taking coal from Kilburn & Co

through Graham & Co.; and Kilburn & Co. got the indenture of the wagons transferred from the "Baron Ardrossan" to other ships.

The rule of the port was that a vessel could not have a berth assigned to her until there was either coal actually ready for her on the wharf or about immediately to come down in sufficient quantities to make the loading continuous.

As a matter of fact, when the "Baron Ardrossan" did get a berth and had begun to load, she was twice removed from her berth, because there was no coal ready to put on board her.

Under the terms of the charter-party, lay-days were not to count until the steamer was in berth, and as she was not in her berth till the 13th February, lay-days in the strict sense of the term did not begin to run till then. But the plaintiffs alleged that the delay in getting to her berth was due to the fact that the charterers were not ready to load, and that, not being ready, they did not take proper steps to procure a berth.

If a ship is prevented from getting to a loading berth owing to an obstacle created by the charterer, or owing to the default of the charterer in performing his duty, then it is well established that the shipowner has done all that is needful to bring the ship to the loading place, and that the charterer must pay for the subsequent delay. Whether the latter's measure of liability is arrived at by giving to the shipowner damages for the delay or whether the lay-days are antedated to the date when they ought to have begun, and the charterer pays for them at the agreed rate of demurrage, does not seem to have been determined. But no points as to which of these two measures of payment should prevail, has been made by the parties in this case. The plaintiffs appear to have put their claim as for lay-days; but the appellate Court, which has decided in their favour has treated the question as one of damages which are to be assessed if no agreement is come to, and this decision has been accepted by the plaintiffs.

Their Lordships have, therefore, to decide whether the delay in getting to a loading berth was or was not, due to the act or default of the charterer. The Judge of first instance thought that it was not so due. He thought that a berth was not available, and that it was the congestion of shipping which prevented the vessel from getting to a berth He found

> that so far as the period anterior to the 14th February is concerned, the delay in loading the cargo was due to 'Baron Ardrossan' not obtaining a berth by reason of causes for which the charterers cannot be held responsible.

He added:

> If it is requisite to invoke an exception of the charter-party, I should be prepared to hold that the charterers are protected by Clause 25.

As to this application of Clause 25 in the charter-party, their Lordships cannot agree with Buckland, J. The words "government regulations and restrictions" do not include local regulations made by the port authorities and affecting the time or manner of loading in the port. If the charterers are to succeed in this case, it will be because the delay in getting a berth was occasioned by causes for which they were not responsible.

Dealing, then, with this question, their Lordships are of opinion that the view of the facts which was taken by the appellate Court is sounder than the view taken by Buckland, J. As Greaves, J., says:

> If a cargo of coal had been ready for the 'Baron Ardrossan' on the 29th December or a day or two later, a berth would have been found for her notwithstanding the condition of the port.

This view is supported by the evidence and he was right therefore, in holding

> that the steamer was prevented entering a berth by the fact that no cargo was ready for her.

As Chakravarti, J., says the reason why the steamer did not get a berth was

> that there was no coal available for her at the docks to load, and unless there was such coal ready for the ship or there was immediate prospect of her getting coal there, the Commissioners of the Port of Calcutta did not allow a ship to enter a coal berth although there was no objection to her going inside the docks and to moor at the buoys there, if vacant.

The truth of the matter is that Kilburn & Co. had arranged to supply coal to many more steamships than there was room for at the coaling berth; that Graham & Co. left the matter to be arranged by Kilburn & Co., and that Kilburn and Co. thought that they had done all that was necessary if they arranged to take these steamships in the order of their arrival at the port.

Coal was actually despatched and labelled for the "Baron Ardrossan" and was then put on board some of the ear-

lier steamships because the "Baron Ardrossan" was not in a berth. Equally, when the "Baron Ardrossan" got into a berth, coal destined and labelled for other steamships was put on board her.

But, as the appellate Court rightly finds upon the evidence, if the port authorities hed been informed that there was coal ready for the "Baron Ardrossan," she would have got a berth and would have been loaded in time. To quote again the judgment of Chakravarti, J.:

> The port authorities did not mind which steamer out of a number of steamers belonging to the same agents was loaded first. Their order of loading was entirely under the control of the agents and the dock authorities were quite indifferent in this matter. The plea that the delay was due to congestion at the coal berths therefore fails. It seems to me therefore that the defendants have failed to bring their case within the provisions of either Clause 3 or Clause 25.

The facts being as the appellate Court correctly found them, the case comes within the principle to be extracted from the decision in *Ashcroft* v. *The Crow Orchard Colliery Co.* (1) as explained by Lord Blackburn in *Postlethwaite* v. *Freeland* (2).

The vessel was at the disposal of the charterers, and it was their own act which caused the delay.

It is idle to say that it was the duty of the ships' agents, who, it may be observed in passing, were also the agents of the charterers, to approach the dock authorities and get the allotment of the berth. They could not do it in one capacity because they were not providing the cargo in the other capacity. On this part of the case the decision of the High Court must stand.

During the course of the argument, their Lordships were referred to two recent cases not yet reported: *The United States Shipping Board* v. *Frank C. Strick & Co., Ltd.*. (House of Lords), and *Owners of Panaghis Vergottis* v. *Wm. Cory & Co.*, (before Greer, J.)

The first case turned on the consideration of a charter-party, different in form to the present and is therefore of no assistance. The second case is not altogether unlike the present and Greer, J., while holding that it was not the charterer's duty to have a full cargo waiting on the quay side to be shipped, held that it was his duty to have a reasonable portion of the cargo ready and to be in a position to supply the rest as it was required, and that if by reason of his not having a reasonable portion ready, the dock authorities would not allow the ship to come to the berth, the charterer was liable to pay damages for the detention of the vessel.

The second matter of appeal concerns the claim for demurrage after the vessel had got into her berth. The excuse for this detention was the shortage of wagons, which is an exception provided for in Clause 3 of the charter-party. As to this it is said that there are concurrent findings of fact by both Courts, and if so the rule of the Board is that such concurrent findings are not to be disturbed. There are conceivable exceptions to this rule, but they do not apply in the present case. It was sought to be shown by documents that there was, taking the port and railway generally from time to time, some shortage; and this was apparently so; but the connexion of such shortage as there was, with the delay in loading this particular ship, or any part of the delay in loading her, was not established. It was found by the Judge of first instance that charterers had but to indent for a sufficient number of wagons, and they would have obtained the number required for the purpose of loading. The Judges in the appellate Court accept this view. Their Lordships cannot re-open this part of the case.

But it is contended for the defendants that there was an accord and satisfaction of this claim for demurrage, the sum of Rs. 2,076-3-9 having been received by the plaintiffs at Colombo in full discharge of this claim.

On this point Buckland, J., decided in favour of the plaintiffs, and rejected the plea. But the appellate Court took a different view, and decided this part of the case against the plaintiffs, and it is from this part of the decree that the original appeal was brought, those matters which their Lordships have already decided forming the subject-matter of the cross-appeal.

Upon this matter their Lordships are in accord with the judgment of Buckland, J. The facts relied on appear, as Greaves, J., observes, from a few documents. There is no oral evidence that bears on the

(1) 9 Q. B. 540=43 L. J. Q. B. 194=31 L. T 266=22 W. R. 825=2 Asp. M. C. 397.
(2) 5 A. C. 599=49 L. J. Ex. 630=42 L. T. 845 =28 W. R, 833.

question. It is difficult to extract from these documents any suggestion of an intention to give up such a large claim. What would appear is that there was no question about the liability of the charterers to the extent of the sum actually paid, and therefore, this sum was taken at once, leaving the question of any farther amount for subsequent arrangement. Except that they got immediate payment which they could always have insisted on by reason of their lien on the cargo, the supposed settlement gave the shipowners nothing. Their Lordships were for the moment impressed by the fact that the cargo was released without full payment being exacted, but it was pointed out that there was no cesser clause in the charter-party, and that the solvency of the defendants, Messrs. Cory Bros. & Co., Ltd., was unquestionable. The burden being on the defendants to prove the accord, they fall short of so doing.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed, and that the judgment of Buckland, J., ordering the defendant Company to pay Rs. 44,416-10-8 with interest, should be restored, and that the cross-appeal should be dismissed and that the plaintiffs do have their costs of this appeal and eross-appsal and in both Courts below.

Appeal allowed.

Solicitors for Appellants — *Botterell & Roche,*

Solicitors for Respondent—*Free, Colt Free & Roscoe.*

*** A. I. R. 1926 Privy Council 125**

(From Allahabad)

23rd July 1926

VISCOUNT DUNEDIN, LORD ATKINSON AND MR. AMEER ALI

Thakur Bhagwan Singh—Appellant.

v.

Allahabad Bank, Ltd.—Respondent.

Privy Council Appeals Nos. 34 to 36 of 1925 and Allahabad Appeals Nos. 8 to 10 of 1920.

1926 K/16 b/4 & 17 a/4

* *Practice—Privy Council—Lower Courts coming to same findings on different grounds no ground for interference.*

Privy Council will not interfere with concurrent findings of fact unless very definite and explicit grounds for that interference are assigned : 27 *I. A.* 166, *Ref.*

The mere fact that the Subordinate Judge went principally on oral evidence, while the High Court went on the effect of certain letters in arriving at the finding is no ground for interference : 30 I. A. 41 *Appl.* [P 125 C 2]

Geo. Lowndes and *K. Brown*—for Appellant.

A. M. Dunne, W. Wallach and *B. Dube*—for Respondents.

Viscount Dunedin.— These three cases all turn on the same point of fact. The appellant, Thakur Bhagwan Singh had a place of business in Agra, and he occasionally resided there. When he was not there one Babu Lal carried on business for him. In all these suits he is sued on bills which are either drawn or accepted by Babu Lal, and the whole point turns to Babu Lal's authority so to do. It was agreed that the evidence in each of the three cases should be available in the others.

The appellant denied all knowledge of the bills and of the authority. Both Courts found that he was absolutely untrustworthy, and that his statements were worth nothing. Now, in the Appeals Nos. 34 and 36, there are concurrent findings of the learned Subordinate Judge and the High Court that Babu Lal had authority to sign the bills and they, therefore, come under the general rule observed by this Board as to concurrent findings, which is that they will not interfere unless very definite and explicit grounds for that interference are assigned. (see Lord Hobhouse in *Moung Tha Hnyeen* v. *Maung Pan Nyo* (1).

But the only definite ground alleged here is that the Subordinate Judge went principally on oral evidence, while the High Court went on the effect of certain letters that is no ground.

In *Ram Anugra Narain Singh* v. *Chowdhry Hanuman Sahai* (2) this Board at p. 43 said this :

The appellant's counsel, however, contended that this finding was not within the rule, because the Courts were not quite agreed on the grounds

(1) [1901] 28 Cal. 1=27 I. A. 166=4 C. W. N. 808=7 Sar. 786 (P. C.).

(2) [1901] 30 I. A. 41=33 Cal. 303=7 C. W. N. 225=8 Sar. 409 (P. C.).

of their decision—the Subordinate Judge relying on the oral testimony, while the High Court based its finding on the documentary evidence. But the rule is none the less applicable because the Courts may not have taken precisely the same view of the weight to be attached to each particular item of evidence.

In Appeal No. 35 there were concurrent findings as to five bills which the app llant alleged to be forgeries, but as regards four bills the learned Subordinate Judge held that there was a special agreement which entitled Babu Lal to sign only when the appellant was absent. The learned Judges of the Court of appeal finding on the letters and the circumstances proved in all the cases, came to the conclusion that Babu Lal had full authority to sign. Their Lordships see no reason for differing from that opinion. They will, therefore, humbly advise His Majesty to dismiss all three appeals with costs.

Appeals dismissed.

Solicitors for Appellant— *Douglas Grant & Dolo*

Solicitors for Respondents—*H. S. L. Polak.*

A. I. R. 1926 Privy Council 126

(FROM PATNA : A. I. R. 1924 PATNA 537)

30th July 1926

THE LORD CHANCELLOR, LORD JUSTICE WARRINGTON AND CHIEF JUSTICE ANGLIN

Jagadishwar Narayan—Appellant.

v.

Muhammad Hazig Hussain and *others*—Respondents.

Privy Council Appeal No. 124 of 1924 ; Patna Appeal No. 48 of 1923.

Bengal Land Revenue Sales Act (11 *of* 1859), *S.* 33—*Sale held under inaccurate description—Point not raised in appeal to Commissioner—Separate suit to set aside sale does not lie* : **2 Pat. L. J. 402 (F. B.), Overruled.**

In order that a sale may be annulled by the Court, a plaintiff must prove (1) that the sale was made contrary to the provisions of the Act : (2) that he had sustained substantial injury by reason of the irregularity complained of ; and (3) that he specified the irregularity in question in his appeal to the Commissioner. Where therefore a sale was held under an inaccurate description, but the plaintiffs proved no substantial injury by reason of the mis description, and not raise the point before the Commississioner as a ground in appeal, a separate suit to set the sale aside is barred : **2 Pat. L. J. 402 (F. B.), Overruled.** [P. 128, C.]

It would be regrettable if the title of a purchaser under the Act of 1859 was liable to be impeached by suit in respect of a trifling error which is not proved to have substantially affected the price given for the property. The first persons to suffer by such an interpretation of the Act would be the defaulting proprietors, for the effect would be to deter purchasers from bidding freely at a revenue sale : 42 *Cal.* 897 (*P. C.*) and 21 *Cal.* 70 (*P.C.*), *Ref.* [P. 129, C.]

A. M. Dunne and *S. Hyam*—for Appellant.

A. Majid—for Respondents.

The Lord Chancellor.—This is an appeal from a decree of the High Court of Judicature of Patna affirming a decree of the Subordinate Judge of Monghyr, by which a sale of certain land under the Bengal Land Revenue Sales Act (No. XI of 1859) was set aside as invalid.

The suit related to a portion of an estate known as Chak Maharuddin Khatik bearing No. 3309 on the Tauzi of the Collectorate of Monghyr, and paying an annual revenue to the Government of Rs. 129-13-0. The estate had belonged to a number of proprietors in several shares, but in respect of some of the shares separate accounts had been opened under S. 11 of the Act, leaving a residue belonging to the respondents jointly and bearing an annual revenue of Rs. 80-9-0, payable by quarterly instalments. By a rule made by the Board of Revenue under S. 3 of the Act, the latest dates for the payment of all arrears of revenue in respect of this and other estates had been determined to be the 7th June, 28th September, 12th January and 28th March.

It appeared by the books of the Collector of the district, that, on the 7th June 1917, the sum of Re. 1-11-9 was in arrear and unpaid in respect of the residuary share of the estate belonging to the respondents jointly ; and accordingly, on the 5th August 1917, the Collector gave notice in accordance with the Act that the ijmali (or joint) share constituting the residue of the estate would be put up for sale by auction on the 24th September 1917, for the arrear of revenue ; and at the auction held on that date the appellant was the highest bidder for the share and was declared the purchaser at the price of Rs. 850.

On the 10th December 1917 some of the respondents preferred an appeal to the Commissioner of Revenue under

question. It is difficult to extract from these documents any suggestion of an intention to give up such a large claim. What would appear is that there was no question about the liability of the charterers to the extent of the sum actually paid, and therefore, this sum was taken at once, leaving the question of any farther amount for subsequent arrangement. Except that they got immediate payment which they could always have insisted on by reason of their lien on the cargo, the supposed settlement gave the shipowners nothing. Their Lordships were for the moment impressed by the fact that the cargo was released without full payment being exacted, but it was pointed out that there was no cesser clause in the charter-party, and that the solvency of the defendants, Messrs. Cory Bros. & Co., Ltd., was unquestionable. The burden being on the defendants to prove the accord, they fall short of so doing.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed, and that the judgment of Buckland, J., ordering the defendant Company to pay Rs. 44,416-10-8 with interest, should be restored, and that the cross-appeal should be dismissed and that the plaintiffs do have their costs of this appeal and eross-appsal and in both Courts below.

Appeal allowed.

Solicitors for Appellants — *Botterell & Roche,*

Solicitors for Respondent—*Free, Colt Free & Roscoe.*

*** A. I. R. 1926 Privy Council 125**

(From Allahabad)

23rd July 1926

VISCOUNT DUNEDIN, LORD ATKINSON AND MR. AMEER ALI

Thakur Bhagwan Singh—Appellant.

v.

Allahabad Bank, Ltd.—Respondent.

Privy Council Appeals Nos. 34 to 36 of 1925 and Allahabad Appeals Nos. 8 to 10 of 1920.

1926 K/16 b/4 & 17 a/4

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The mere fact that the Subordinate Judge went principally on oral evidence, while the High Court went on the effect of certain letters in arriving at the finding is no ground for interference : 30 I. A. 41 *Appl.* [P 125 C 2]

Geo. Lowndes and *K. Brown*—for Appellant.

A. M. Dunne, W. Wallach and *B. Dube*—for Respondents.

Viscount Dunedin.— These three cases all turn on the same point of fact. The appellant, Thakur Bhagwan Singh had a place of business in Agra, and he occasionally resided there. When he was not there one Babu Lal carried on business for him. In all these suits he is sued on bills which are either drawn or accepted by Babu Lal, and the whole point turns to Babu Lal's authority so to do. It was agreed that the evidence in each of the three cases should be available in the others.

The appellant denied all knowledge of the bills and of the authority. Both Courts found that he was absolutely untrustworthy, and that his statements were worth nothing. Now, in the Appeals Nos. 34 and 36, there are concurrent findings of the learned Subordinate Judge and the High Court that Babu Lal had authority to sign the bills and they, therefore, come under the general rule observed by this Board as to concurrent findings, which is that they will not interfere unless very definite and explicit grounds for that interference are assigned. (see Lord Hobhouse in *Moung Tha Hnyeen* v. *Maung Pan Nyo* (1).

But the only definite ground alleged here is that the Subordinate Judge went principally on oral evidence, while the High Court went on the effect of certain letters that is no ground.

In *Ram Anugra Narain Singh* v. *Chowdhry Hanuman Sahai* (2) this Board at p. 43 said this :

The appellant's counsel, however, contended that this finding was not within the rule, because the Courts were not quite agreed on the grounds

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(2) [1901] 30 I. A. 41=33 Cal. 303=7 C. W. N. 225=8 Sar. 409 (P. C.).

tion of the Collector's books, of the grounds of appeal to the Commissioner of Revenue and his replies, and of the pleadings in the suit, is to make it plain that the sum in question became due at some time before the 1st June, 1917, and so became an arrear on that date: and if so, the latest date for payment of the amount under S. 3 of the Act and the rules of the Board was the 7th June 1917, so that a sale on the 24th September was regular. Upon this view of the facts it is unnecessary to consider whether, if the sale had been shown to be premature, S. 33 of the Act would have been an answer to this objection.

The second ground taken by the learned Subordinate Judge in his judgment is of a different nature. It appears to be the fact that, while the property offered for sale, namely the ijmali share which formed the residue of the estate, was correctly described on the face of the notice of sale, and the revenue payable in respect of it (namely Rs. 80-9-0) was correctly given, there was an error in the details of the area of the property noted on the reverse side of the notice, this error amounting to about 1½ bighas out of a total of 158 bighas. It was not alleged or proved that the price given for the property was affected by the misdescription, nor was the point raised on the appeal to the Commissioner; but it has nevertheless been held on the authority of the previous decision of the High Court that the misdescription was sufficient to invalidate the sale. The correctness of the decision under this head depends upon the effect to be given to S. 33 of the Act of 1859, which provides as follows:

> No sale for arrears of revenue, or other demand realizable in the same manner as arrears of revenue are realizable, made after the passing of this Act, shall be annulled by a Court of Justice except upon the ground of its having been made contrary to the provisions of this Act, and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of: and no such sale shall be annulled upon such ground, unless such ground shall have been declared and specified in an appeal made to the Commissioner under S. 25 of this Act; and no suit to annul a sale made under this Act shall be received by any Court of Justice unless it shall be instituted within one year from the date of the sale becoming final and conclusive, as provided in S. 27 of this Act.

At first sight this section appears to be a complete answer to this part of the case. The effect of it is that, in order that a sale may be annulled by the Court, a plaintiff must prove (1) that the sale was made contrary to the provisions of the Act; (2) that he had sustained substantial injury by reason of the irregularity complained of, and (3) that he specified the irregularity in question in his appeal to the Commissioner; and in the present case, while it may be assumed that the sale under an inaccurate description was contrary to the provisions of the Act, it is plain that the plaintiffs proved no substantial injury by reason of the misdescription and did not raise the point before the Commissioner. But it was held in the case cited, which the High Court felt itself bound to follow, that the section had no application to such a case; and the point for decision is whether that view is correct.

In the case cited *Mahant Krishna Gir* v. *Abdul Guffar* (1) as in the present case, the residuary share of an estate was offered for sale and the sadar jama of the residuary share was correctly stated in the notice of sale; but an error was made in stating the particulars of the property, a small interest being ommitted from those particulars. An appeal to the Commissioner had failed as having been preferred out of time, and on a suit being brought to set aside the sale, it was not proved that the error had seriously prejudiced the sale; but the Full Bench, holding that the Collector must be taken to have offered for sale less than the whole amount of the residuary share and that he had no jurisdiction so to do, set the sale aside. In other words, they held (as Das, J. put it in his judgment in the present case) that the existence of the Collector's jurisdiction to sell, and not its exercise only, was affected. No doubt that decision covered the present case, and the High Court was under an obligation to follow it; but in their Lordships' opinion the decision cannot be sustained. In that case, as in this, the notice showed plainly the intention of the Collector to offer for sale the whole of the residuary share; for the expression "the ijmali share" which appeared upon the face of the notice, denotes (as Chapman, J. said in the case cited) the rights of those proprietors who have not opened separate accounts. Further, the sadar jama specified on the face of the notice was the

amount payable in respect of the whole residuary share. The intention to offer the whole residue for sale was, therefore, clear, and although an error occurred in noting on the reverse side of the notice the particulars of the area of the property, that was an error in the exercise of the Collector's powers and had no effect on his jurisdiction. This being so, it might have been made the subject of an appeal to the Commissioner, and the omission to specify the point as a ground for that appeal is a bar to its being raised in suit. The point is stated with admirable lucidity in the judgment of DAS, J., with which McPHERSON, J., concurred; and their Lordships are entirely satisfied with his reasoning on this point.

It is only necessary to add that it would be regrettable if the title of a purchaser under the Act of 1859 were liable to be impeached by suit in respect of a trifling error which is not proved (as in *Ravanshwar Prasad Singh* v. *Baijnath Ram Goenka* (3) to have substantially affected the price given for the property. As was pointed out by the Board in *Rajah Gobind Lal Roy* v. *Ramjanam Misser* (4) the first persons to suffer by such an interpretation of the Act would be the defaulting proprietors, for the effect would be to deter purchasers from bidding freely at a revenue sale.

Counsel for the respondents attempted to raise a further point, based on an alleged breach of duty by one of the defendants in not paying the amount due for revenue, but this argument, which was negatived by the Subordinate Judge and was abandoned in the argument before the High Court, is not now open to the respondents.

For the above reasons their Lordships are of opinion that this appeal should be allowed, and that judgment in the suit should be entered for the first defendant (the present appellant) with costs here and below, and they will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors for Appellant — *Barrow Rogers* and *Nevill.*

Solicitors for Respondents—*Chapman Walker* and *Shephard.*

(3) [1915] 42 Cal. 897=28 I.C. 699=42 I.A. 79 (P. C).

(4) [1894] 21 Cal. 70=20 I.A. 165=6 Sar. 356 (P. C.).

* * A. I. R. 1926 Privy Council 129

(*From Calcutta*: *A. I. R.* 1924 *Cal.* 578)

27th July 1926

LORD CARSON, MR. AMEER ALI AND SIR JOHN WALLIS

William Arratoon Lucas—Appellant.

v.

Bank of Bengal and *others*—Respondents.

Privy Council Appeal No. 11 of 1925; Calcutta Appeal No. 109 of 1923.

* * *Transfer of Property Act, S. 59—Assignment of mortgagee rights with mortgagor's consent not duly attested may not effect a valid mortgage but it binds the mortgagor.*

L executed two mortgages in favour of Messrs V, who had arranged to finance L by getting B Bank to honour his drafts on their guarantee. These mortgages were subsequently transferred by the mortgagees to the Bank by virtue of a registered instrument, to which L was a party. The document recited that it had been agreed that the mortgagees "should transfer the full benefit of the securities (created by the mortgage deeds) to the Bank to the intent that the Bank should henceforth hold the same as security for repayment to the Bank on demand of the amounts due and interest thereon" in consideration of the Bank releasing the mortgagees from all claims in respect of these transactions. This recital was followed by a conveyance of the mortgaged premises to the Bank, subject to redemption on payment by the mortgagor of the amount, then payable under the principal indenture and the supplemental indenture and all interest at the rate aforesaid. This document was not attested by two witnessez as required by the Transfer of Property Act.

Held: that the fact that this latter arrangement between the Bank and the mortgagor failed to take effect for want of due attestation of the document as a mortgage, affords no reason for refusing to give effect to it as a validly executed transfer of the earlier mortgages, by the mortgagees to the Bank in consideration of their release from the liability they had incurred to the Bank. [P 130 C 1]

Geo. Lowndes and *E. B. Raikes*—for Appellant.

A. M. Dunne and *G. D. McNair*—for Respondents.

Sir John Wallis.—This is an appeal from the judgment of the High Court of Calcutta reversing the judgment of the Subordinate Judge at Dacca and giving the plaintiffs, the Bank of Bengal a decree against the first defendant Lucas, a jute merchant at Dacca, on two mortgages of the 8th July, 1910 and the 29th June 1911, executed by the first defendant in favour of Messrs. Vertannes and Bertram, his brokers, who, to put it shortly, had arranged to finance him by getting the

Bank to honour his drafts on their guarantee. These mortgages the High Court, reversing the judgment of the Court below held to have been transferred by the mortgagees, to the plaintiff Bank by virtue of a registered instrument, dated the 4th February 1914, to which the first defendant was a party.

It is unnecessary to refer to the numerous questions raised in the Courts below, because the only questions argued before their Lordships on this appeal were whether the transfer was good, and if so, whether the defendant is entitled to go behind the recitals in the instrument of transfer that Rs. 74.017-a1, p4. was the amount then due to the Bank by the mortgagor, the first defendant, to his brokers as mortgagees in respect of these transactions, and to have an account taken of what is due on the mortgages, in which case it was further suggested that nothing would be found due on the earlier mortgage.

As regards the first question, the document recites that it had been agreed that the mortgagees:

> should transfer the full benefit of the securities (created by the deeds of 1910 and 1911) to the Bank to the intent that the Bank shall henceforth hold the same as security for repayment to the Bank on demand of the said sum of Rs. 74,017 a1. p4. and interest thereon,

in consideration of the Bank releasing the mortgagees from all claims in respect of these transactions and this recital is followed by a conveyance of the mortgaged premises to the Bank, subject to redemption on payment by the mortgagor the first defendant,

> of the said sum of Rs. 74,017 1a. 4p., now payable under the principal indenture and the supplemental indenture (the mortgages of 1910 and 1911) and all interest at the rate aforesaid.

It is said that this document, which was not attested by two witnesses, as required in the case of mortgages by the Transfer of Property Act, and was stamped as a transfer and not as a mortgage, amounts to a fresh mortgage by the first defendant in favour of the Bank, and cannot operate as a transfer to the Bank of the earlier mortgages, even though it is inoperative as a mortgage under the Transfer of Property Act for want of due attestation. In this view, the instrument, if duly executed as a mortgage, would have amounted to a transfer of the two earlier mortgages by the mortgagees to the Bank, and to the creation as between the mortgagor, the first defendant, and the Bank, of a fresh mortgage in satisfaction of the rights acquired by the Bank under the transfer. In these circumstances it appears to their Lordships, that the fact that this latter arrangement between the Bank and the first defendant failed to take effect for want of due execution of the document as a mortgage, affords no reason for refusing to give effect to it as a validly executed transfer of the earlier mortgages by the mortgagees to the Bank in consideration of their release from the liability they had incurred to the Bank.

Even if the document had been duly executed as a mortgage, it has been contended before their Lordships that it shows a clear intention to keep alive the earlier securities as well, possibly as a protection against any subsequent incumbrances which might have been created prior to the transfer, and that there would be no sufficient reasons for not allowing it to have that effect. This was the view taken by the learned ludges of the High Court.

As regards the other points, their Lordships agree with the learned Judges that the first defendant cannot now be allowed to question the amount of his liability to his brokers under the mortgages at the date of the transfer as recited in the instrument of transfer. The transfer clearly proceeded on the footing that the first defendant and his brokers, the mortgagees, were severally personally liable to the Bank on that date in the sum of Rs. 74,017, 1a, 4p., and that the brokers were the secured creditors of the first defendant in respect of this liability which they had incurred on his behalf. In this state of things the intention clearly was that the brokers should be allowed to drop out and that by virtue of the transfer, the Bank should become the secured creditor of the first defendant for the full amount.

For these reasons the appeal fails and must be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for Appellant—*Walkins* and *Hunter.*

Solicitors for Respondents—*Morgan, Price Gordon* and *Murby.*

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(*From Swaziland*)

15th April 1926

LORD CHANCELLOR (VISCOUNT CAVE,) VISCOUNT HALDANE, LORDS PARMOOR, PHILLIMORE AND BLANESBURGH

Sobhuza II—Appellant.

v.

Miller and *others*—Respondents.

Privy Council Appeal No. 158 of 1924, from Swaziland Special Court Judgment, D/- 27th May 1924.

British Protectorate — Meaning — Protected country is not British Dominion but Crown controls all its foreign relations—Protected State is semi-sovereign—Protected State in South Africa—Act of State.

In the general case of a British Protectorate although the protected country is not a British Dominion, its foreign relations are under the exclusive control of the Crown, so that its Government cannot hold direct communication with any other foreign power, nor a foreign power with its Government.

The protected State becomes only semi-sovereign for the protector may have to interfere, at least to a limited extent, with its administration in order to fulfil the obligations which international Law imposes on him to protect within the subjects of foreign powers. A restricted form of extra-territorial sovereignty may have its exercise called for, really involving division of sovereignty in the hands of protector and protected. But beyond this, it may happen that the protecting power thinks itself called on to interfere to an extent which may render it difficult to draw the line between a protectorate and a possession. In South Africa the extension of British jurisdiction by Order in Council has at times been carried very far. Such extension may be referred to an exercise of power by an act of State, unchallengeable in any British Court, or it may be attributed to statutory powers given by the Foreign Jurisdiction Act, 1890.

Certain lands formed part of an area subject to a concession, granted by the former King of the Swazis in 1889 in favour of two Europeans, whereby the grantees acquired exclusive right of grazing and agricultural and planting rights over the unoccupied land within the concession for 50 years but it was provided that they were in no way to interfere with the rights of the subjects. The subjects of the appellant, the successor of the former King, and their predecessors had for a long time been in occupation of portions of the land included in the concession. The first respondent, the manager of the Corporation, to whom the grantees had transferred the area including the land in dispute, trespassed on the existing rights of the natives and caussd them to be ejected from their land. Swaziland was formerly a protected dependency under the South African Republic and was treated as an independent Native State both by the South African Republic and by the British Government. The Convention of 1894 between Great Britain and the South African Republic recognized the latter's right of protection, legislation, jurisdiction and administration over Swaziland and the inhabitants thereof but it guaranteed the grazing and agricultural rights of the natives of Swaziland with a proviso that no Law thereafter, made was to be in conflict with the rights so guaranteed by the Convention. In 1903 South African Republic became British territory and Swaziland a British Protectorate by conquest, and the British Crown ordered that the Governor administering Transval might exercise all powers and jurisdiction of the Crown and do all things that were lawful. Subsequently the powers of the Governor were transferred to the High Commissioner of South Africa. By Order in Council, dated 2nd November 1907, portions of certain lands in Swaziland, which were the subject of concessions by the paramount Chiefs aforesaid, were set apart and demarcated by the High Commissioner for the exclusive occupation of natives and the remaining portions for being leased to Europeans claiming under such concessions. By a Proclamation by the High Commissioner on the 10th March 1917 certain area including the land in the Concession of 1880 was proclaimed as Crown land. Under a Crown grant of the same date, the High Commissioner granted to the second respondents a part of the land in dispute by way of compensation for lands relinquished by them in his favour.

Held : that the limitation imposed by the convention of 1894 as regards interference with the rights and laws and customs of natives cannot legally interfere with the subsequent exercise of the sovereign powers of the Crown to invalidate subsequent orders in Council.

The Order in Council of 1907, after providing for power to set apart certain lands in Swaziland, the subject of concessions by the paramount chiefs, enabled the High Commissioner to acquire the remaining land and to deal with it. He had, therefore, full power to make the Crown Grant of 16th March 1917. The power of the Crown to enable him to do so was exercised either under the Foreign Jurisdiction Act, or as an act of State which cannot be questioned in a Court of law. The Crown could not, excepting by statute, deprive itself of freedom to make Orders in Council, even when these were inconsistent with previous orders. [P 132 C 1, 2]

(*b*) *Foreign Jurisdiction Act* (1890) — *Jurisdiction of Crown in Protected State is made like one acquired by conquest.*

The Foreign Jurisdiction Act appears to make the jurisdiction, acquired by the Crown in a protected country, indistinguishable in legal effect from what might be acquired by conquest. It is a statute that appears to be concerned with definitions and secondary consequences rather than with new principles : *Rex* v. *Earl of Crewe*, (1910) 2 *K. B.* 576, *Rel. on.* [P 131 C 1]

Horace Douglas—for Appellant,

Douglas Hogg and *H. M. Viveen* — for Respondents.

Viscount Haldane—This is an appeal from a judgment of the Special Court of Swaziland by which a petition of the appellant has been dismissed with

costs. The petition was presented against the first respondent, and the second respondents, the Swaziland Corporation, Limited, were added at the trial on the footing that they claimed to own the land in controversy and that the first respondent was acting as their manager. The substance of the petition was that certain lands, known as Farm 188 formed part of an area originally subject to a concession known as the "Unallotted Lands Concession," granted by the former King of the Swazis, Umbandine, on 26th July 1889. Under this concession the grantees bound themselves to respect all prior rights, and, further, in no way to interfere with the rights of the native subjects of the grantor. The concession of 1889 was expressed to have been made by the King with the advice and consent of his Indunas in Council in favour of two persons, Thorburn and Watkins, of exclusive grazing, and to have conferred agricultural and planting rights over the unoccupied land within the concession, for fifty years, with a right to renewal, at a yearly rent of £50. The King, in consideration of this, undertook to protect the concessionnaires in the exercise of their rights. The claim made in the petition was that the first respondent had trespassed on the existing rights of native occupiers and had caused them to be ejected from the land they occupied.

Evidence was taken at the trial of the petition. It was found that certain natives and their predecessors had been for a long time in occupation of portions of the land included within the concession, and that they were now being ejected from the portions of the land other than such as had been demarcated for the sole and exclusive use of the natives. The judgment of the Court set out that the original concession had been confirmed on 17th December 1890, by the High Court of Swaziland, a Court constituted by the King of the Swazis with the assent of the British Government and the South African Republic, and having jurisdiction to inquire into the validity of concessions such as that in question. But on the 19th September 1908, the concession was expropriated by the High Commissioner by notice to the concessionnaires under S. 12 of Proclamation No. 3 (Swaziland), 1904.

The judgment went on to state that by Order in Council of 2nd November 1907, the area of the concession became Crown land, as having been expropriated, and that a portion of it was granted to the respondent Company, who claimed a clear freehold title under the grant. The natives, on the other hand, claimed that their rights of use and occupation under native law had not been affected. It was contended for them that the rights they possessed before and after the granting of the concession remained intact, and had been recognized later on by S. 5 of the Order in Council made on 25th June 1903 and that these rights had not been subsequently cut down. The Court held that, at all events by the Order in Council made on 2nd November 1907, the ownership of the land had passed to the Crown, and that the effect of this was to extinguish any rights of use and occupation that were in the natives; and that the documents and circumstances showed that it was intended to extinguish all such rights. As a matter of fact, the natives were given instead sole and exclusive rights over one-third of the land included in the concession, and the concessionnaires had been given such rights over the remaining two-thirds. In the opinion of the Court below the order in Council of 2nd November 1907 was validly made. Even if Swaziland was no more than a Protectorate, it was one which approximated in constitutional status to a Crown Colony, and the Crown had power to make laws for the peace, order and good government of Swaziland, and of all persons therein. Any original native title had, therefore, been effectually extinguished.

The question which their Lordships have to consider is whether this conclusion was right in point of law. Into any topic of policy they are, of course, precluded from entering. In order to come to a conclusion on the legal question it is necessary to look at the history and circumstances in which it has arisen. Swaziland lies on the east of the Transvaal, between that country and the coast. It was treated as an independent native state both by the South African Republic and by the British Government, notwithstanding a good deal of interference by both in its affairs, and it was recognized, and still

is recognized, as a Protectorate. But the South African Republic appears, from the terms of the convention made in 1894, to have become preponderant in the internal control. The relationship seems to have been recognized as being one in which Swaziland stood to the Republic as a protected dependency administered by the South African Republic. This Protectorate stopped short of incorporation, but apparently it was recognized by the Convention of 1894 between Great Britain and the South African Republic (Art. II) as, giving the latter, without incorporation, all rights of protection, legislation, jurisdiction and administration over Swaziland, and the inhabitants thereof. The natives were, however, guaranteed in their laws and customs, so far as not inconsistent with laws made pursuant to the convention, and in their grazing and agricultural rights, with the proviso that no law thereafter made in Swaziland was to be in conflict with the guarantees given to the Swazi people in the convention.

The question which at once presents itself is, what is the meaning of a Protectorate. In the general case of a British Protectorate, although the protected country is not a British dominion, its foreign relations are under the exclusive control of the Crown, so that its Government cannot hold direct communication with any other foreign power, nor a foreign power with its Government. This is the substance of the definition given by Sir Henry Jenkyns at p. 165 of his book on "British Rule and Jurisdiction beyond the Seas." Their Lordships think that it is accurate, and that it carries with it certain consequences. The protected State becomes only semi-sovereign; for the protector may have to interfere, at least to a limited extent, with its administration in order to fulfil the obligations which international law imposes on him to protect within it the subjects of foreign powers. A restricted form of extra-territorial sovereignty may have its exercise called for, really involving division of sovereignty in the hands of protector and protected. But beyond this, it may happen that the protecting power thinks itself called on to interfere to an extent which may render it difficult to draw the line between a Protectorate and a possession. In South Africa the extension of British jurisdiction by Order in Council has at times been carried very far. Such extension may be referred to an exercise of power by an act of State, unchallengeable in any British Court or it may be attributed to statutory powers given by the Foreign Jurisdiction Act, 1890. This statute provided, upon the preamble that by treaty, capitulation, grant, usage, sufferance, and other lawful means, the Crown has power and jurisdiction in divers countries and places outside its dominions, and that it was expedient that Acts relating to the exercise of such jurisdiction should be consolidated, that it should be lawful for the Sovereign to hold, exercise and enjoy any jurisdiction now or hereafter posseessed within a foreign country in the same and as ample a manner as if the jurisdiction had been acquired by cession or conquest of territory, and that every act and thing done in pursuance of any such jurisdiction was to be as valid as if it had been done according to the local law then in force in that country.

It was provided that any Order in Council made in pursuance of the Act should be laid before both Houses of Parliament within a limited time, and should have effect as if enacted in the Act. The Foreign Jurisdiction Act thus appears to make the jurisdictton, acquired by the Crown in a protected country indistinguishable in legal effect from what might be acquired by conquest. It is a statute that appears to be concerned with definitions and secondary consequences rather than with new principles. This view of it was also that taken in an important judgment of the Court of appeal, *Rex* v. *Earl of Crewe* (1). There, by an Order in Council, the High Commissioner for South Africa had been authorized to provide in the Bechuanaland Protectorate for the administration of justice and for the peace, order and good government of all persons within that Protectorate and the prohibition and punishment of all acts tending to disturb the public peace. Sekgome, the chief of a native tribe, was detained in custody under a proclamation purporting to have been made by the High Commissioner under the powers so conferred. He applied for

(1) [1910] 2 K. B. 576.

a habeas corpus against the Secretary of State for the Colonies. It was held that the Protectorate was a foreign country within the meaning of the Foreign Jurisdiction Act, and that the proclamation was validly made.

It was further held that the detention was lawful, inasmuch as the construction of the Act settled by practice rendered it impossible to limit its application to British subjects in the foreign country. Lord Justice Vaughan Williams considered that the proclamation under which the detention took place was valid as a law which the Act gave the Crown absolute power to make and apply, just as if the territory had been obtained by cession or conquest. He held that the detention could be independently justified as an act of State. Lord Justice Kennedy concurred, definitely on the view that the detention could be justified as an act of State, as well as under the Foreign Jurisdiction Act. The stress in the judgment of Lord Justice Farwell, who arrived at the same conclusion as to the validity of the proclamation under which the detention was made, was laid on the construction of that Act, which he interpreted in a similarly wide sense.

In the *Southern Rhodesia* Case (2), Lord Sumner, in an elaborate judgment given on behalf of the Judicial Committee on a special reference, expressed views which are substantially simillar. He held that a manifestation by Orders in Council of the intention of the Crown to exercise full dominion over lands which are unallotted is sufficient for the establishment of complete power. Both of these cases imply that what is done may be unchallengeable ou the footing that the Order in Council, or the proclamation made under it, is an act of State. This method of peacefully extending British dominion may well be as little generally understood as it is, where it can operate in law unquestionable.

Such being the principle, it remains to ascertain whether it has been put in operation in the case under consideratfon. To answer this question it is first necessary to recall the true character of the native title to land throughout the Empire, including South and West Africa

(2) [1919] A, C. 211=88 L. J. P. C. 1=119 L. T. 698=34 P, L. R 595.

With local variations the principle is a uniform one. It was stated by this Board in the Nigerian case of *Amodu Tijani* v. *The Secretary for Southern Nigeria* (3), and is explained in the Report made by Chief Justice Rayner on Land Tenure in West Africa, quoted in the case referred to at p. 404. The notion of individual ownership is foreign to native ideas. Land belongs to the community and not to the individual. The title of the native community generally takes the form of a usufructuary right, a mere qualification of a burden on the radical or final title of whoever is Sovereign. Obviously such a usufructuary right, however difficult to get rid of by ordinary methods of conveyancing, may be extinguished by the action of a paramount power which assumes possession or the entire control of the land.

Turning next to the history of what was done in Swaziland by the British Government, the material events may be stated briefly :

Swaziland was originally under the rule of native kings, and concessions conferring rights in respect of land were granted by them to persons other than natives. The land in question was granted, by the concession known as the "Unallotted Lands Concession" of 26th July 1889, to Thorburn and Watkins, as already stated. The grant was made by King Umbandine, who reigned between 1875 and 1889. The grant which was of farming and planting rights for fifty years, with a provision for renewal at an annual rent of £50, bound the grantees in no way to interfere with the rights of the King's native subjects. There was conferred power to sublet or transfer.

In September 1890 Ungwane, the then King of the Swazis, set up by organic proclamation a Chief Court composed of three judicial members approved by the British High Commissioner and the President of the South African Republic, such Court to have full jurisdiction over all persons in Swaziland of European extraction, and over all questions, matters and things in which such persons were concerned. The Court was to undertake judicial inquiry into the validity of disputed concessions. In 1890 it confirmed the concession in question. By deed of cession the grantees transferred the area

(3) 1921] 2 A. C. 399.

comprised in it, including the territory in dispute, but excepting certain distinct areas which had previously been transferred to others, to the second Respondents. Ungwane was succeeded by his son, Sobhuza, the appellant, who is the present King or paramount chief.

When the Boer war broke out in 1899 Swaziland had for some years come to be under the protectorate of the South African Republic. This was the result of the convention of 1894 between the Republic and the British Government. After the conquest and annexation of that Republic, by Order in Council of 25th June 1903, the Crown, on the recital that by the conquest and annexation all rights and powers of the South African Republic had passed to the British Sovereign, ordered that the Governor administering the Transvaal might exercise all powers and jurisdictions of the Crown and take all such measures and do all such things as were lawful and in the interest of His Majesty's service, as he might think, subject to instructions, expedient. The Governor was expressly empowered by proclamation to provide for the administration of justice, the raising of revenue, and generally for the peace, order and good government of Swaziland, and of all persons therein, including the prohibition and punishment of acts tending to disturb the public peace. He was, in issuing such proclamations, to respect any native laws by which the civil relations of any native chiefs, tribes or populations under His Majesty's protection were regulated, except so far as the same might be incompatible with the due exercise of His Majesty's power and jurisdiction or clearly injurious to the welfare of the natives. Such proclamations were to be published and might be disallowed or modified by the Sovereign.

By Order in Council of 1st December 1906, the powers given to the Governor administering the Transvaal were transferred to the High Commissioner for South Africa. By a subsequent Order in Council of 2nd November 1907, on the recital that it was intended that portions of certain lands in Swaziland, the subject of concessions or grants made by paramount chiefs and confirmed by the Chief Court under the organic proclamation of 1890, should be set apart and demarcated for the exclusive use and occupation of natives, and that the remaining portions should be granted or leased to European persons claiming rights under such concessions or should be held by the High Commissioner for South Africa, His Majesty, by virtue of the powors vested in His Majesty under the Foreign Jurisdiction Act or otherwise, ordered that all rights in any land in the said territory, not being land set apart and demarcated by the authority of the High Commissioner for the sole and exclusive occupation of the natives, and proclaimed as Crown lands, and also in any land within the territory lawfully transferred to or expropriated by the High Commissioner in exercise of the powers vested in him by proclamation or otherwise for the peace, order, and good governmert of the territory, should vest in and be exercised by the High Commissioner, who might make grantg or leases of such lands.

By proclamation of the High Commissioner made on 16th March 1917, certain areas were proclaimed as Crown lands. and among these areas was a portion of the lands included in the Unallotted Lands Concession of 1889. This had been in 1908 expropriated by notice given by the High Commissioner under the powers vested in the Governor of the Transvaal by the Order in Council of 25th June 1903, the exercise of whlch he had provided for by Swaziland Proclamation No. 3 of 1904. Under a Crown grant of 16th March 1917, the High Commissioner granted to the second respondents a part of the land subject to the concession and now in dispute. as compensation for lands which they had relinquished in his favour. By proclamation promulgated on the same date the High Commissioner had proclaimed to be Crown land the portion of the unallotted land included in the original Unallotted Lands Concession, and this portion included the land granted as compensation to the second respondents and now in dispute.

The principles of constitutional law laid down in the earlier part of their Lordships' judgment render it in their opinion impossible to maintain the argument submitted for the appellant. That argument is that the Crown has no powers over Swaziland, except those which it had under the conventions and thosewhich it acquired by the conquest of the South

African Republic. The limitation in the convention of 1894 on interference with the rights and laws and customs of the natives cannot legally interfere with a subsequent exercise of the sovereign powers of the Crown, or invalidates subsequent Orders in Council. But if this be true it makes an end of the appellant's case. For the Order in Council of 1907, after providing for power to set apart certain lands in Swaziland, the subject of concessions by the paramount chiefs enable the High Commissioner to acquire the remaining land and to deal with it. He had therefore full power to make the Crown Grant of 16th March 1917. The power of the Crown to enable him to do so was exercised either under the Foreign Jurisdiction Act, or as an act of State which cannot be questioned in a Court of law. The Crown could not, excepting by statute, deprive itself of freedom to make Orders in Council, even when these were inconsistent with previous Orders.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. As the question involved is concerned with constitutional issue and is of far-reaching public interest, they will advise, following precedents in other cases, that there should be no costs of the appeal.

Appeal dismissed.

Solicitor for Appellant—*E. F. Hunt.*

Solicitor for Respondent—*The Treasury Solicitor.*

A. I. R. 1926 Privy Council 136

(*From Supreme Court Straits Settlements.*

5th July 1926

VISCOUNT HALDANE AND LORDS ATKINSON AND DARLING

R. M. K. R. M. Somasundaram Chetty —Appellant.

v.

M. R. M. V. L. Subramanian Chetty— Respondent.

Appeal from a judgment of the Court Sf Appeal of the Supreme Court of the otraits Settlements, D/- the 22nd September, 1924.

(a) Principal and Agent—Agent contracting with third party on behalf of undisclosed principal—Third party may sue agent or principal on the contract, but suit against one bars a fresh suit against the other.

Where an agent contracte in his own name for an undisclosed principal, the person with whom he contracts may sue the agent or he may sue the principal; but if he sues the agent and recovers judgment he cannot afterwards sue the principal, even although the judgment does not result in satisfaction of the debt: 4 *A. C.* 504 and 3 *H. & C.* 977, *Foll.* [P 140, C 1, 2]

(b) Practice—Judgment—Judgment once pronounced cannot be lightly set aside—Court cannot rehear a case after judgment is pronounced—Accidental slip or mis-statement of the Judge's intention in the judgment can only be corrected.

Legal judgments cannot be treated as mere counters in the game of litigation. They are serious pronouncements, for the most part by the judicial officers of the State, touching the rights or disputes of subjects, bringing home to those subjects what the rules of justice required and are enforceable, if need be, by the forces of the State. Moreover, when once pronounced they cannot be lightly set aside. [P 139, C 2]

The Court has no jurisdiction after the judgment at the trial has been passed and entered to rehear the case. The only cases in which the Court can interfere after the passing and entering of the judgment are: (1) where there has been an accident or slip in the judgment as drawn up, in which case the Court has power to rectify it; and (2) where the Court itself finds the judgment as drawn up does not correctly state what the Court actually decided and intended: *Ainsworth* v. *Wilding*, (1896) 1 *Ch.* 673, *Foll.* [P 141, C 2]

The mere fact that the parties to a suit were under the impression that the result of suing and being sued in the names of the respective attorneys of their respective principals would be the same as if the principals themselves were the parties litigant, is not sufficient to vitiate a judgment regularly pronounced. [P 139, C 2]

Jowitt—for Appellant.

Lord Atkinson.—This is an appeal from a judgment of the Court of appeal of the Supreme Court of the Straits Settlements, dated the 22nd September 1924, dismissing the appeal of the defendants in two consolidated suits against the judgment of the Supreme Court of the Straits Settlements, dated the 26th May 1924.

The principal questions in this appeal are whether the respondents (the plaintiffs in the consolidated suits,) are precluded from recovering judgment in the second suit (viz., Suit 1923, No. 50) by reason of the judgment recovered by them in the first suit (viz. Suit 1923, No. 120) and whether there was jurisdiction in the consolidated suits to set aside the judgment in the first suit (viz., Suit 1923, No. 120).

The appellants and the respondents are money-lenders carrying on business in

Penang ; the respondents (plaintiffs) under the vellasam or mark of M. R. M. V. L. and the appellants (defendants) under that of R. M. K. R.M. The defendant firm is owned by one Rameswamy Chetty, of Palavangudy, Ramnad District, Southern India. It is the practice for such firms to carry on their business through an attorney and agent and to describe and style the firm by its vellasam or mark coupled with the name of its Penang agent for the time being. Subramanian Chetty was at all material times the attorney and agent of the plaintiff firm and A. N. S. Somasundaram Chetty the attorney and agent of the defendant firm.

The relation in which these attorneys or agents, when engaged in a money-lending business, stood to their principals, whether the latter were individuals or firms, their functions and powers, are well and authoritatively described by Mr. Justice Barrett-Lennard in his judgment delivered in this case in the Court of appeal on the 22nd September 1924. He said :

First, when a local representative of a Chetty firm carries on the business under the vellasam (i. e., the letters) of the firm coupled with his own distinct name, the announcement to the external world in general is that, whether a co-partner with, or a mere agent of, other persons, he is to be looked upon as a principal. It is to be noted that the vellasam of a firm is not its full style. Next, a local representative of the type described does not label himself as simply an agent. He regularly sues as a principal on mortgage deeds, bills of sale and promissory notes. The title of his co-partners or principals to immovables granted in form to him is never abstracted or otherwise shown on the occasion of any sale or qualified disposition. The rights of his principals or co-partners are in truth behind the curtain, much to the disadvantage of the Government.

Mr. Jowitt contended, in the clear and forcible argument he addressed to the Board on behalf of the appellants, that in reality in the money-lending business in Penang, the vellasam of a firm coupled with the name of a local representative, whether in fact partner, attorney or agent, merely meant to inform the public that this named person was then conducting the business of the local branch of the firm.

On the 27th February 1923, a writ of sommons was issued in a cause (Suit 1923, No. 120) at the suit of M. R. V. L. Subramanian Chetty against R. M. K. R M. Somasundaram Chetty, claiming a sum of $ 7,40,000 described as " balance principal of current account," and,

interest from the 28th August 1922, to the 27th February 1923, at $ 125 per $ 100 per mensem as per Chetty's current account.

The writ was served personally on Somasundaram Chetty, who, on the 14th March 1923, entered an appearance in person not by solicitor running thus :

Enter appearance for R. M. K, R. M. Somasundaram Chetty.....
Signed R. M. K. R. M. Somasundnram Chetty, defendant.

On the 19th March 1923, a summons was taken out by G. E. Wright Motion, solicitor for the plaintiff, addressed to R. M. K. R. M. Somasundaram Chetty, requiring the latter to

appear before the Registrar in Chambers on Friday, the 23rd March 1923, at 11 o' clock in the forenoon on the hearing of an application on the part of the plaintiff for an order under S. 208 of the Civil Procedure Code for leave to sign final judgment against the defendant for the sum of $ 7,798, being the amount of balance, principal and interest, due on current account as endorsed on the writ of summons. Notwithstanding the appearance entered by the defendant in person and costs to be taxed.

That application was supported by the affidavit of M. R. M. V. L. Subramanyam Chetty, who swore that the defendant was justly indebted to him (presumably under that description) in the sum of $ 7,298,60, described as being the amount of the balance for principal and interest due on current account. Then R. M. K. R. M. Somasundaram Chetty, by his solicitor Mr. Lim Cheng Ean, took out a summons for further particulars of the plaintiff's claim. This summons was supported by the affidavit of the defendant, in which he denied being indebted to the plaintiff in the sum claimed and further denied ever having agreed to pay interest at the rate of $ 125 per $ 100, or that such a rate of interest was payable on Chetty's current accounts. On the 28th March 1923, an order was made by Mr. H. G. Sarwar, the Registrar, to the effect that the plaintiff was at liberty to sign judgment sgainst the defendant for the sum of $ 7,400, with costs, and that the defendant was at liberty to defend as to the balance. The defendant never did defend as to the balance, possibly because he was superseded in his offlce, but the result apparently was that in Suit No. 120 judgment was signed for the original capital sum of $ 7,400. The person who was the principal of the

business of which Somasundaram was the attorney, was named Ramaswamy Chetty, R. M. K. R. M. being his firm.

On the 10th April 1923, M. R. M. V. L. Subramaniam Chetty commenced proceedings in bankruptcy, founded on his judgment of the 28th March 1923, for $ 7,400 and costs,by issuing a notice directed against Ramaswamy Chetty and his firm R. M. K. R. M., but entitled as against R. M. K. R. M. Somasundaram Chetty, and by a bankruptcy petition dated the 15th May 1923, sought to get a receiving order and an order of adjudication against Ramaswamy Chetty. There could be no more effectual way of treating the judgment in Suit No. 120 as a valid judgment than thus making it the basis of bankruptcy proceedings. On the 18th June 1923, Mr. Justice Sproule, by his order, set aside this bankruptcy notice on the ground that the service of it was defective. The plaintiff entered an appeal against this order, but did not prosecute the objection. The plaintiff in the Original Suit No. 120 then issued a fresh bankruptcy notice against R. M. K. R. M. Somasundaram Chetty, but had it directed against Ramaswamy and his firm, and obtained an order for substitution of service of the notice on Ramaswamy's attorney in Penang.

The application was one to set aside this bankruptcy notice on the ground (inter alia) that the judgment of the 28th March 1923 (i. e., Suit No. 120). upon which the bankruptcy notice was based, was a judgment against Somasundaram Chetty, and not against the firm R. M. K. R. M. or its sole proprietor Ramaswamy Chetty. On the 13th July 1923, by an order of that date, Mr. Justice Sproule dismissed this application. On appeal the Court of appeal allowed the appeal, reversed the order of Mr. Justice Sproule of the 13th July 1923, set aside the order allowing substituted service of the bankruptcy notice and declared that Ramaswamy Chetty had not committed any act of bankruptcy. The importance of these proceedings lies in this, that the foundation on which they were based is the judgment signed in Suit No. 120 for the capital sum of $ 7,400, and the persistent effort of the plaintiff in that suit has been to enforce that judgment as a valid and binding legal adjudication. There could be no more emphatic way of asserting its validity.

On the 5th September 1923 an action was commenced by a specially endorsed writ of summons in Suit No. 550, by the firm M. R. M. V. L. against the firm R. M. K. R. M., claiming to recover not only the principal sum of $ 7,400, for which a judgment had been already recovered in Suit No. 120, but interest calculated at $ 125 per $ 100 per mensem, amounting in the whole to $ 8,376,40. Ramaswamy, who carries on business at Penang under the mark R. M. K. R. M., entered an appearance and required a statement of claim to be delivered to him. A summons was, on the 17th September 1923, taken out by the plaintiff firm under S. 208 of the Civil Procedure Code, requiring the parties concerned to appear before the Registrar in Chambers at 10 o'clock on the morning of the 24th September 1923, on the hearing of an application on the part of the plaintiff, calling on the defendant firm to show cause why final judgment should not be entered against them for the sum of $ 8,376,40, being the amount endorsed on the writ for balance of principal and interest and costs. This summons was supported by an affidavit made by Subramanian Chetty describing himself as attorney of the plaintiff firm who proved the debt claimed. This summons was opposed on an affidavit of one S. S. Subramanian Chetty, who described himself as the attorney of R. M. K. R. M. Ramaswamy Chetty. The deponent denied that the defendant firm was indebted to the plaintiff in the sum of $ 8,376,40, or any part thereof and then added the following statement :—

I am informed and verily believe that in Suit 1923, No. 120 the said M. R. M. V. L. Subramanian Chetty, the attorney of the plaintiffs above named, sued the said R. M. K. R. M. Somasundaram Chetty in person claiming a sum of $ 7,400 (besides interest thereon) as the balance of principal due from him on current account and on the 28th day of March 1923, recovered a judgment for the said sum of $ 7,400 and costs personally against R. M. K. R. M. Somasundaram Chetty and that proceedings to enforce the said judgment were issued against the said R. M. K. R. M. Somasundaram Chetty. In this action the plaintiffs claim the same amount of $ 7,400 (besides interest thereon) as balance of principal due to them on the same current account and seek to recover another judgment on the same claim against the defendant firm.

I am advised and verily believe that the defendants have a good defence to this action.

By summons dated the 17th September 1923, the plaintiffs applied for judgment in the Suit 1923, No. 550. Upon the hearing of the summons the Registrar gave leave to defend. The plaintiffs appealed to the Judge against the order giving leave to defend, and on the 1st October 1923 issued a summons in Suit No. 120 for an order that the judgment in that suit be set aside on the ground, as stated in the summons.

That it has been held by the Court of appeal (in the bankruptcy proceedings) to be judgment against Somasundaram Chetty personally which the plaintiff never asked for and on which there was no adjudication.

On the 5th October 1923 a summons was taken out by the plaintiff's solicitor (who was also the solicitor of A. N. S. Somasundaram Chetty, who had been the attorney of the defendant firm in Penang until May 1923, when his power of attorney was cancelled) requiring the parties interested to appear before the Court in Chambers on the 8th October 1923 on the hearing of an application on the part of the plaintiff for an order that Suit 1923, No. 120, between M. R. M. V. L. Subramanian Chetty and R. M. K. R. M. Somasundaram Chetty might be consolidated with Suit 1923, No. 550, and that the action might thenceforth be carried on as if they were one action, and that all necessary and proper directions might be given as to the conduct and carriage thereof, and that the costs of the parties in the actions, including the costs of that application, might be costs in the consolidated actions. The application was adjourned into Court for argument and came on for hearing on the 8th October 1923, before Mr. Justice Sproule who granted the application asked for, that Suits No. 120 and No. 550 should be consolidated and be thenceforth carried on as one suit. But strange as it may appear, while these proceedings for the consolidation of the two suits were taking place, the earlier proceedings were also taking place: first, an application by the plaintiff in Suit No. 120 to set aside the judgment signed in that suit, and, second, an appeal by the plaintiff in Suit No. 550 from an order of the Registrar made on the 24th September 1923, granting the defendant liberty to defend. The questions involved were fully argued on three occasions, and it was ultimately ordered that the summons and appeal should stand for judgment, and same standing for judgment it was, on the 12th October 1923, ordered that the appeal should be dismissed and be dealt with on the trial of the consolidated actions, and that the costs be reserved to the trial. So that not only is the impeached judgment made the basis of active bankruptcy proceedings, but its existence is prolonged until the termination of the consolidated actions, and its validity is to be in that suit determined.

Legal judgments cannot be treated as mere counters in the game of litigation. They are serious pronouncements, for the most part by the judicial officer of the State, touching the rights of disputes of subjects, bringing home to those subjects what the rules of justice required and are enforceble, if need be, by the forces of the State. Moreover, when once pronounced, they cannot be lightly set aside.

It may perhaps (be there is no proof of it) that the parties to Suit No. 120 were under the impression that the result of suing and being sued in the names of their respective attorneys of their respective firms (their principals) would be the same as if the firms themselves were the parties litigant, but that is not the kind of error, if it be an error, which vitiates a judgment regularly pronounced. Certainly it does not suggest that this error existed when one sees the judgment.

The statement of claim in the consolidated actions was delivered on the 16th November 1923, and the defence of Ramaswamy Chetty was delivered on the 6th December 1923. The first is a very lengthy document; but the following facts are not really in controversy: first, the causes of action in Suits No. 120 and No. 550 are the same—a debt of 17,400 owed to the same firm, a balance on current account (the fact that interest was claimed in the latter suit cannot alter matters.) Second, that the judgment in Suit No. 120 only bound Somasundaram, the attorney of the firm R. M. K. R. M., personally. Paras. Nos. 26 to 31, inclusive of the statement of claim, contain apparently the only comments which, it is alleged, tend to show that the plaintiff, in instituting the suit, was mistaken, or misled, or fell into error.

It is stated that the people in Penang knew well the meaning of R. M. K. R. M. Somasundaram Chetty and knew that

all transactions effected in his name were transactions with, and were binding on, the firm, and were not personal transactions of the attorney. This is precisely what the Chief Justice has held is not the position. It is then averred that Ramaswamy Chetty held out A. N. S. Somasundaram Chetty as his authorized agent and attorney to do business on behalf of his firm, and that Ramaswamy authorized his attorney to open the accounts which resulted in the debt sued for. In the statement of claim it is averred that R. M. K. R. M. Ramaswamy Chetty and A. N. S. Somasundaram Chetty were not joint contractors, nor was the latter a partner in the firm R. M. K. R. M. and the judgment signed sub nomine R. M. K. R. M. was not a bar to judgment being given against R. M. K. R. M. Ramaswamy Chetty; that the judgment dated 28th March 1923, i.e., the judgment in Suit No. 120, was bad and void in law and should be set aside; that this judgment was not and was never intended to be signed against A. N. S. Somasundaram Chetty personally, or against anyone except the the firm R. M. K. R. M.; that A. N. S. Somasundaram Chetty is a person, but R. M. K. R. M. is merely a trading name and has no personal existence at all; that A. N. S. Somasundaram Chetty is a person and was not sued as a defendant in that suit, and he is not bound by it. Most of these averments are flatly contradicted by the documents in the case. Somasundaram Chetty, was sued in the case as R. M. K. R. M. Somasundaram Chetty, which on the admitted facts means that this latter person was attorney or agent or partner of the firm indicated by the letters R. M. K. R. M. That is abundantly proved.

These two judgments which were signed in Suits No. 120 and No. 550 were both based on the same cause of action and directed against the agent of a firm and the other against the firm itself and cannot in law co-exist in valid and effective force. In *Kendall* v. *Hamilton* (1) the Lord Chancellor stated with fullness and characteristic accuracy the law upon this point. At page 514 he says:

> Now I take it to be clear that where an agent contracts in his own name for an undisclosed principal the person with whom he contracts may sue the agent or he may sue the principal; but if he sues the agent and recovers judgment he cannot afterwards sue the principal, even although the judgment does not result in satisfaction of the debt.

If any authority for this proposition is needed, the case of *Priestly* v. *Fernie* (2) may be mentioned. The reasons why this must be the case are, their Lordships think, obvious.

It would be clearly contrary to every principle if a creditor who has seen and known and dealt with and given credit to the agent should be driven to sue the principal if he does not wish to sue him, and, on the other hand, it would be equally contrary to justice that the creditor, on discovering the principal who really has had the benefit of the loan, should be prevented from suing him if he wished to do so. But it would be no less contrary to justice that the creditor should be able to sue first the agent and then the principal when there was no contract and no intention of any of the parties that he should do so. Again, if an action were brought and judgment recovered against the agent, then the agent would have a right of action for indemnity against his principal, while if the principal was liable also to be sued he would be vexed with a double action. Further, if actions could be brought and judgments recovered against the agent and afterwards against the principal there will be two judgments in existence for the same debt or cause of action. They might not necessarily be for the same amounts, and there might be recoveries had or liens and charges created by means of both, and there would be no record on the face of the judgments, or any means short of a fresh proceeding, of showing that the two judgments were really for the same debt or cause of action, and that satisfaction of one was or would be satisfaction of both.

The case of *King* v. *Hoare* (3), was approved of by the Lord Chancellor and Lords Hatherley, Penzance, O' Hagan Selborne, Blackburn and Gordon, and applied by each to the facts of the case, with the exception of Lord Penzance who held that the rule laid down in *King* v. *Hoare* (3) was only a rule of law and that since the Judicature Act of 1873

(1) 4 A. C. 501=48 L. J. C. P. 705=41 L. T. 418=28 W. R. 97.

(2) 3 H. & C. 977=34 L. J. Ex. 173=13 W. R. 1089.

(3) 13 M. & W. 494=2 D. & L. 382=14 L. J. Ex. 29.

the rule of equity as to such matters had superseded the law. The other noble Lords delivered judgment in practical agreement with that of the Lord Chancellor, and it was decided that an action and judgment against two persons who had borrowed money from the plaintiffs (though the judgment be unsatisfied) constitute a bar to another action brought by the same plaintiffs against a third person who was afterwards discovered to have been interested as a partner with the two debtors in the business for the purposes of which the money was borrowed. In Vol. 1, p. 209, of Halsbury's Laws of England, in paragraph 445 one finds a paragraph supported by the authorities referred to which expresses accordingly the law on the point. It runs thus:

> Where, however, the other contracting party, whether in ignorance of the principal's existence or not, obtains a judgment against the agent *Kendall* v. *Hamilton* (1) or though he knows at the time when the contract is made or discovers afterwards who the real principal is, elects to look to the agent to the exclusion of the principal the principal is discharged from liability and his liability cannot be revived, such election is conclusively proved by obtaining judgment against the agent even for part of the claim. *Dunn* v. *Newton* (4); *Addison* v. *Gandasqui* (5); *Priestly* v. *Fernie* (2); *Peterson* v. *Gandasqui* (6); *Morel* v. *Earl of Westmoreland* (7).

It may possibly be, but it is not proved in evidence, that the plaintiff in Suit No. 120, the attorney, agent or partner of or in the firm of M. R. M. V. L., was under the impression that he could obtain a judgment for $ 7,400 against the defendant the attorney, agent or partner of or in the firm of R. M. K. R. M. which would not merely be a personal judgment against the attorney or agent but a judgment against the defendant attorneys' firm. If the plaintiff attorney was under that impression it was wholly due to his ignorance of the law, and it is because he instituted and prosecuted to judgment Suit No. 120 in that state of ignorance that he or his principal now claims to have this judgment set aside. No fraud was practised upon the plaintiff in that suit, or his principal; no false representation was made to them; no inducement held out to the agent to sue in the way he did; and no misleading steps were taken or acts done with the consent of the defendant attorney or his principal. It appears to their Lordships that the claim to have this judgment set aside resembles very much the case of a litigant who, with erroneous and exaggerated notions of his rights, brings an action to enforce those rights as he understands them and is beaten because the Judge comes to a wholly different conclusion as to the extent of those rights and directs judgment to be entered against him, and then the defeated litigant applies to have this judgment set aside because he had mistakenly formed an extravagent opinion of his own rights which misled him into litigation.

It is, of course, open to the plaintiffs, both attorney and principal, to bring an action to have the judgment entered up in Suit No. 120 set aside. They do not take that course; they apparently want to have it set aside by motion. It is not necessary to cite on this point any authorities in addition to *Ainsworth* v. *Wilding* (8). Romer, J., in giving judgment in that case, said at page 676:

> The Court has no jurisdiction after the judgment at the trial has been passed and entered to rehear the case. Formerly the Court of Chancery had power to rehear cases which had been tried before it even after decree had been entered, but that is not so since the Judicature Acts. So far as I am aware the only cases in which the Court can interfere after the passing and entering of the judgment are these (1) where there has been an accident or slip in the judgment as drawn up, in which case the Court has power to rectify it under O. 28, R. 11 and (2) where the Court itself finds the judgment as drawn up does not correctly state what the Court actually decided and intended.

He points out that he is not dealing with cases where the Court acts with the consent of the parties. Cotton, L. J., *In re Swire* (9) said:

> It is only in special circumstances that the Court will interfere with an order which has been passed and entered except in cases of a mere slip or verbal inaccuracy, yet, in my opinion, the Court has jurisdiction over its own records, and if it finds that the order as passed and entered contains an adjudication upon that which the Court in fact never has adjudicated upon, then in my opinion it has jurisdiction which it will, in a proper case, exercise to correct its record that it may be in accordance with the order really pronounced.

(4) 1 C. & E, 278.
(5) 4 Taunt 374=13 R. R. 689.
(6) 15 East 70.
(7) [1904] A. C. 11=73 L. J. K. B. 93=89 L. T. 702=52 W. R. 353=20 T. L. R. 38.
(8) [1896] 1 Ch. 673=65 L. J. Ch. 432=74 L. T. 193=44 W. R. 540.
(9) 30 Ch. D. 239=53 L. T. 205=33 W. R. 785.

Lindley, L. J., said :

If it be once made out that the order whether passed and entered or not does not express the order actually made, the Court has ample jurisdiction to set that right, whether it arises from a clerical slip or not.

And Bowen, L. J., said :

An order, it seems to me, even when passed and entered may be amended by the Court so as as to carry out the the intention and express the meaning of the Court at the time when the order was made, provided the amendment be made without injustice or in terms which preclude injustice.

These authorities may not directly apply to the present case, since it is not contended that the form of the judgment in Suit No. 120 is different from what it was intended to be. The weakness of the respondent's case appears to their Lordships to consist mainly in this, that there is no evidence whatever that Subramanian Chetty was under any mistake or misconception whatever in instituting Suit No. 120, as to the form in which it was instituted, neither was there any evidence that the two attorneys believed that their two principals were by their description made parties litigant to the suit.

Their Lordships are therefore of opinion that the order appealed from was erroneous and should be set aside, and that judgment should be entered for the appellants with costs here and below, and they will humbly advise His Majesty accordingly.

Appeal allowed.

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* A. I. R. 1926 Privy Counci 142

(From Ajmer-Merwara)

19th October 1926

VISCOUNT HALDANE, LORD DARLING AND CHIEF JUSTICE ANGLIN

Dewan Bahadur Seth Umed Mal and *others*—Appellants.

v.

Chand Mal—Respondent.

Privy Council Appeal No. 105 of 1925.

* *Civil P. C., S.* 115—*Mortgagee claiming through mortgagor, land from a third party—Mortgagor not impleaded—Suit decreed—Court acts with material irregularity within S.* 115.

Where the plaintiffs claimed the land in dispute under a mortgage from M and the main question was whether M had included the particular land in his mortgage but the Court disposed of the suit without impleading M.

Held ; that it was a material irregularity to decide the case in the absence of M and a revision lay. [P 144 C 1, 2]

George Lowndes and *E. B. Raikes*—for Appellants.

A. M. Dunne and *S. Hyam*—for Respondent.

Viscount Haldane.—This is an appeal from a decree of the Chief Commissioner, Ajmer-Merwara, in his revisional jurisdiction, which reversed a decree of the Court of the District Judge. The latter had confirmed a decree of the Subordinate Judge at Ajmer dismissing a suit instituted in his Court by the appellants. The subject-matter of the suit was 15½ bighas of land, which, it is agreed, belonged originally to one Haji Mohammed Khan, and at his death had devolved on his daughter, one Mt. Fatima Begum, along with a bungalow called in the suit Bungalow No. 5. The proceedings were for a declaration of title and for possession.

On 7th July 1893, Mt. Fatima and her husband had executed a mortgage charging some of the properties belonging to them for a debt due to the predecessors in title of the appellants. The properties mortgaged to them were enumerated in the mortgage deed. Among them was what was described as follows :

One Bungalow No 5, with outhouses, and the land of the compound connected with the bungalow situate in Qasba Dargah Khaja Sahib, Ajmer, which has fallen to the share of Mt. Fatima Begum, alias Badshah Begum, by partition—

East—Land of Isar and Nihal Mali.

West—Road compound of the bungalow of Rev. Gray.

South—Land of Isar and Nihal Mali.

North—Land and Baori of Fatima Begum, alias Badshah Begum.

On 27th March 1903, the predecessors in title of the appellants instituted a suit on the mortgage, and a decree was made in the usual form. There was a subsequent application for execution of the decree by sale, and at the Court auction sale the decree-holders purchased two of the properties mortgaged, including what was misdescribed as to its number but was really Bungalow No. 5, with the out offices and compound belonging to it. The purchasers were put in possession.

Bungalow No. 5 is shown on the map of the neighbourhood which w

admitted in these proceedings. as Plot No. 1594 There are five other parcels, numbered on this map 1592, 1599, 1588, 1600 and 1601, measuring in all over 15 bighas. These belonged to Mt. Fatima, as well as other plots to which she was entitled jointly, and her interest in which was not included in the mortgage.

In 1907 the appellants instituted a suit for pre-emption of these five parcels, but questions having arisen as the title of a third party this suit was withdrawn, with leave to institute a fresh suit.

The present suit was commenced on 27th November 1910, in the Court of the Subordinate Judge of Ajmer, by the appellants against the respondent, who claimed to be a purchaser from the third party, and against his tenant. Among the issues raised was whether the suit was defective because of non-joinder of parties. On 24th November 1915, the Subordinate Judge, after trying the suit, made a decree in favour of the appellants' claim to the five parcels. He examined the arbitrator's award, under which Mt. Fatima's share in her father's estate was ascertained, and came to the conclusion that the land in dispute was not described in the award, merely because it had been treated as attached to Bungalow No. 5. He held accordingly that it must be taken to have been included in the general description of the property mortgaged. No doubt is raised that the disputed land was awarded to Mt. Fatima, but the question whether that land was included by her in the mortgage she made is quite a separate one. The District Judge of Ajmer, before whom the case was brought by the respondent on appeal took the same view as the Subordinate Judge. He construed the parcels in the mortgage deed as including the bighas in controversy.

An attempt was made by the respondent to obtain a submission of the questions raised to the High Court of Judicature for the North-Western Provinces. This application was ruled out by the District Judge. Finally an application for revision, under the joint operation of S. 115 of the Civil P. C., and the Ajmer Courts Regulations of 1877, was made to the Chief Commissioner of Ajmer. The effect of S. 115 is that the High Court, or in the case of Ajmer, under the Ajmer Regulations, the Court of the Chief Commissioner, may call for the record of any case which has been decided by any Court subordinate to it and in which no appeal lies; and if it appears (a) to have exercised a jurisdiction not vested in it by law; or (b) to have failed to exercise a jurisdiction so vested; or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, it may make such order in the case as it thinks fit. In the present case it is common ground that, so far as any simple question of fact was concerned, the jurisdiction of the Chief Commissioner to entertain an appeal was held to be excluded. For as the question of what the parcels in the mortgage deed included, the two lower Courts were in agreement, so that to this extent no appeal would lie. The Chief Commissioner, however, looking at the boundaries on the map and comparing them with the description in the mortgage, was of opinion that it was impossible, as matter of law, to reconcile these. This suit was one for possession, in which the plaintiff had to recover by the establishment of his own title, and not by showing flaws in that of those in possession. As the result, the Chief Commissioner, in the exercise of his power under S. 115, dismissed the appellants' suit, reversing the decree of the Courts below.

Although the point was not very distinctly dealt with, their Lordships think that there was jurisdiction in the Chief Commissioner to entertain the proceedings for revision. So far as they are at liberty to deal with the point as to descriptions and parcels, they have arrived at the same conclusion as the Chief Commissioner, who has sufficiently expressed the reasons which have influenced them in coming to that conclusion. But the real question is whether there was jurisdiction to get so far and review what, in certain aspects at all events, was a decision on a question of fact. Their Lordships are of opinion that S. 115 of the Civil P. C., conferred such jurisdiction under the circumstances of this case. They think that the respondent was entitled to apply for a review on the ground that the lower Courts acted in the exercise of their jurisdiction with material irregularity within the meaning of S. 115 (c) of the Code of Civil Procedure. The suit was one in which the plaintiffs claimed the bighas in dispute

under a mortgage from Mt. Fatima. They asked for a declaration of title and for possession, and justice required that they should have made Fatima a defendant. The main question was whether she had included the bighas in the mortgage deed. In their Lordships' view it is far from clear that under the terms of the deed she did. There are suits of class in which a decree of this kind might possibly be made in the absence of the mortgagor for what it is worth. But their Lordships are of opinion that the present is not a suit of such a class. The very question is whether Fatima ever conveyed the bighas to the alleged mortgagees, and it was a material irregularity to decide it in the absence of herself. Under the circumstances, the Chief Commissioner had the power to make such order in the case as he thought fit. On consideration of the mortgage deed and the evidence, he has held that the appellants, on whom as plaintiffs, in ejectment the burden of proof lay, have failed to make out their title. Their Lordships agree with him in thinking that the suit ought to be dismissed. They agree, also, with his direction as to costs, but they think that the respondent is entitled to have the costs of this appeal. Accordingly, they will humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

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Advocate High
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